Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

DARCY TING, An Individual
And On Behalf Of All Others Similarly Situated, And
CONSUMER ACTION, A Non-Profit Membership Organization,
Both As Private Attorneys General,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held – contrary to *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002), the prior decisions of this Court, and the express provisions of the orders of the Federal Communications Commission ("FCC") – that, absent a tariff filing requirement, the lawfulness of the rates, terms, and conditions of interstate long distance services is not governed exclusively by §§ 201 and 202 of the Communications Act, but is subject to challenge under unconscionability and other laws of individual states?

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.6, petitioner AT&T Corp. states that it has no parent company, and there is no publicly held company that owns 10% or more of AT&T's stock.

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PETITION FOR A WRIT OF CERTIORARI

AT&T Corp. ("AT&T") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of court of appeals (Appendix ("App.") 1a-43a) is reported at 319 F.3d 1126 (9th Cir. 2003). The opinion of the District Court (App. 44a-110a) is reported at 182 F. Supp. 2d 902 (N.D. Cal. 2002).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on February 11, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Sections 10, 201-208, and 254(g) of the Communications Act, 47 U.S.C. §§ 160, 201-208, and 254(g), are reprinted at App. 118a-129a.

STATEMENT OF THE CASE

In this case, the Ninth Circuit exempted California residents from the limitation of liability and consumer remedies provisions of the Consumer Services Agreement that had begun governing AT&T's national interstate long distance services on August 1, 2001 – which was the effective date of the orders of the Federal Communications Commission ("FCC") that ended the tariffing of these services under § 203 of the Communications Act. It was undisputed that these provisions of AT&T's contract are just, reasonable, nondiscriminatory, and lawful under §§ 201 and 202 of the

Communications Act and the FCC's rules and policies. The Ninth Circuit held, however, that the effect of the FCC's *Detariffing Orders* is that the lawfulness of the rates, terms, and conditions of interstate telephone services is now governed by state law. The Ninth Circuit further held that the challenged contractual provisions are "unconscionable" under California law, and it enjoined AT&T from enforcing them against California residents.

This decision conflicts with the holding of the Seventh Circuit on this same issue, with the prior decisions of this Court, and with the FCC's *Detariffing Orders* and its policies.

First, as the Ninth Circuit acknowledged (App. 10a-11a), its decision conflicts with the decision in *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). The Seventh Circuit there held that §§ 201 and 202 of the Communications Act preempt unconscionability and other state law challenges to the rates, terms, and conditions of interstate long distance services following detariffing. The Seventh Circuit thus enforced under federal law the very provisions of the AT&T Consumer Services Agreement that the Ninth Circuit here invalidated under state law.

Second, the Ninth Circuit's decision conflicts with prior decisions of this Court. They hold that the ban on preferences and other terms of §§ 201 and 202 of the Act preempt state law challenges to contractual provisions that limit the liability of communications common carriers where, as here, the carriers are exempt from statutory tariffing requirements. *E.g, Western Union Tel. Co.* v. *Esteve Bros.*, 256 U.S. 566, 570-74 (1921); *Postal Tel. Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27, 30 (1919); see *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998).

Third, the Ninth Circuit's decision conflicts with the FCC's *Detariffing Orders* and with the FCC's policies. The FCC expressly held that its *Detariffing Orders* did "not affect" the operation of §§ 201 and 202 of the Act, that these statutory

provisions would "continue[] to govern" the "lawfulness" of the "rates, terms, and conditions" for interstate long distance services, and that state law would govern only "other issues, such as contract formation." *Interstate, Interexchange Marketplace*, 12 FCC Rcd. 15,014, 15,057 (¶ 77) (1997). Further, the FCC's policy is to rely on marketplace forces – not cost of service data or state law standards of unconscionability – to assure that the rates, terms, and conditions of interstate services are just and reasonable.

The resolution of these conflicts in this case is a matter of great national importance. Although the provisions of AT&T's Consumer Services Agreement currently apply to consumers in the Seventh Circuit (and elsewhere), the Ninth Circuit's decision means that these same provisions cannot apply to AT&T's 7 million long distance customers in California.

Further, the issue has importance beyond AT&T and its 40 million interstate long distance customers. The challenged provisions of AT&T's Consumer Services Agreement include arbitration requirements and bans on class actions which were previously imposed by tariffs by some carriers and which have become terms and conditions of the interstate services of virtually all major long distance carriers. That is the case because the FCC generally permits marketplace forces to determine the terms and conditions that long distance carriers offer and because consumers of long distance services place little value on judicial and class remedies and prefer the lower rates that these provisions allow carriers to offer. Review of the Ninth Circuit's decision and the resolution of the conflicts that it creates thus has profound importance for the entire long distance industry and for the federal laws that govern it.

1. The Regulation Of Interstate Long Distance Carriers. Federal law has governed the lawfulness of the rates, terms, and conditions of interstate telecommunications services since 1910. In that year, Congress subjected interstate telephone and telegraph carriers to some but not all of

the requirements of the Interstate Commerce Act (ICA) that previously applied only to railroads. Congress exempted long distance carriers from the requirement (§ 6 of the ICA) that they set forth the rates, terms, and conditions of their service in tariffs. At the same time, Congress subjected these carriers to the requirement that the rates, terms, and conditions of their services be "just and reasonable" (§ 1 of the ICA) and to the prohibitions against "unreasonable discrimination" (§ 2 of the ICA) and against extending any "unreasonable or undue preference or advantage to any person, class of persons, or localities" (§ 3 of the ICA).

Thereafter, this Court held that, even in the absence of any duty to file and adhere to tariffs, §§ 1-3 of the ICA and their ban on unreasonable preferences for any locality preempt state law challenges to any of the rates, terms, or conditions of interstate telecommunications services, including contractual provisions that limit a telecommunications carrier's liability to its customers.[1]

In the Communications Act of 1934 (47 U.S.C. §§ 151 *et seq.*), Congress transferred authority over interstate telecommunications services to the Federal Communications Commission (FCC). Congress also adopted substantive and procedural requirements that were copied, almost verbatim, from the Interstate Commerce Act – in order "to preserve the value of court and commission interpretation" of these provisions. H.R. Rep. No. 73-1850, at 4 (1934).

Section 201 of the Act codified the requirement (of § 1 of the ICA) that the "charges, practices, classifications, and regulations" of interstate telecommunications services be "just and reasonable." Section 202(a) codified both (1) the ban (of § 2 of the ICA) on any unreasonable discrimination in the "charges, practices, classifications, regulations, facilities,

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[1] *Western Union Tel. Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921); *Postal Tel. Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27 (1919); *see Unrepeated Message Case*, 44 ICC 670 (1917).

or services" for or in connection with "like communication service" and (2) the prohibition (of § 3 of the ICA) against the making or giving of any "undue or unreasonable preference or advantage to any particular person, class of persons, or locality."

The Communications Act of 1934 also extended to interstate telecommunications carriers the same provisions for the filing and review of tariffs that previously had applied only to railroads. Section 203(a) required every common carrier to file tariffs containing all their rates, and all classifications, practices, and regulations affecting their rates. Section 203(c) prohibited carriers from charging any rates or extending to any person any privilege or classification, regulation, or practice affecting rates that was not specified in its filed tariff. Sections 204 and 205 of the Act allowed the FCC to review and to investigate tariff provisions in advance of their effective date and to order revisions to filed tariffs if it found that their provisions violated the substantive requirements of §§ 201 and 202 of the Act.

The Act also provides federal remedies to consumers who contest the lawfulness of the rates, terms, and conditions of interstate long distance services. It allows them to file complaints that the FCC is required to investigate and prosecute (§§ 206 & 208) or to file lawsuits in federal district courts (§ 207).

2. The FCC's Pre-1996 Policies Governing Competitive Long Distance Services. After competition was introduced into long distance services in the 1970s, the FCC modified – or attempted to modify – its regulations for "nondominant carriers," which the FCC defined as carriers lacking market power. AT&T was classified as a nondominant carrier in 1995, and all existing providers of long distance services are today classified as nondominant.

The FCC first exempted nondominant carriers from the requirements that they file their rates in advance of their

effectiveness or that they file or maintain cost data to support the rates and terms and conditions of their services. The FCC concluded that marketplace forces and other regulatory remedies would generally prohibit a carrier from adopting rates, terms, or conditions that are unjust and unreasonable or unreasonably discriminating in violation of §§ 201 and 202 and that there was no need for cost of service rate regulation of nondominant carriers. *Competitive Common Carrier Servs.*, 85 FCC 2d 1, 33-37 (¶¶ 97-106) (1980).

Thereafter, the FCC also sought to end tariff filings by nondominant carriers. The FCC concluded that marketplace forces and complaints for violations of §§ 201 and 202 could sufficiently guarantee compliance with these substantive provisions, and that tariffs were not necessary to enforce these provisions. *Competitive Common Carrier Servs.*, 91 FCC 2d 59, 71 (¶ 24) (1982). Although courts acknowledged that these FCC findings were reasonable, courts vacated these FCC orders on the ground that tariffs were then Congress's "chosen means" of enforcing §§ 201 and 202 and that the FCC then had no statutory authority to exempt carriers from these requirements. *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 230-31 & n.4. (1994).

3. The Telecommunications Act of 1996. In the Telecommunications Act of 1996 ("1996 Act"), Congress adopted federal requirements designed to foster competition in local and other *intrastate* telephone services that had previously been subject to the exclusive jurisdiction of state commissions and that were monopolies. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999). But the 1996 Act also adopted two amendments to the Communications Act that apply to the competitive *interstate* long distance services over which the FCC has exclusive jurisdiction.

First, Congress granted the FCC the authority to "forbear from applying . . . any provision of [the Act]" to particular carriers or services. 47 U.S.C. § 160(a). But Congress provided that the FCC may exercise this authority only if the

FCC finds (1) that enforcing the provision is not "necessary to ensure" that the rates, terms, and conditions of the service are "just and reasonable and are not unjustly or unreasonably discriminatory"; (2) that enforcing the provision is not necessary for the protection of consumers; and (3) that forbearing from enforcing the provision is in the public interest. *Id.*

Second, Congress enacted a new provision of the Act that is designed generally to maintain nationally uniform rates for all "interstate interexchange [*i.e.*, long distance] services" offered by each carrier. 47 U.S.C. § 254(g). Section 254(g) requires the FCC to adopt rules that "require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." *Id.*

4. The FCC's *Detariffing Orders.* On March 5, 1996, the FCC issued a notice of proposed rulemaking to adopt rules that would both implement § 254(g)'s uniform rate requirements and also "forbear" from applying the tariffing requirements of § 203 to the interstate long distance services of nondominant carriers. *Interstate, Interexchange Marketplace*, 11 FCC Rcd. 7141 (1996).

In its *First Report and Order*, the FCC implemented the rate uniformity requirements of § 254(g) by adopting rules that codified the FCC's existing interpretations of § 202(a) of the Act. *Interstate, Interexchange Marketplace*, 11 FCC Rcd. 9564, 9574-75 (¶ 21) (1996). These rules generally require carriers to provide long distance service at the same standard rates throughout the nation. But they also permit carriers to meet competition by offering services that provide discounts from basic rate schedules and specialized services to meet the needs of large customers so long as they are available to all "similarly situated" customers "regardless of their geographic location." *Id.* at 9576-77 (¶¶ 24 & 27).

In its *Second Report and Order*, the FCC exercised its forbearance authority to prohibit nondominant carriers from filing tariffs for interstate long distance services. *Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20,730 (1996). It reasoned, again, that tariff filing requirements are not necessary to ensure that long distance rates, terms, and conditions are just, reasonable, and nondiscriminatory. It found that marketplace forces will generally prevent carriers from offering rates, or imposing terms and conditions, that violate §§ 201 or 202 of the Act, and that if carriers nonetheless did so, the complaint process under § 208 of the Act constitutes a "more effective means of remedying such conduct" than does tariff filings. *Id.* at 20,742-43 (¶ 21). The FCC further found that tariff filings were unnecessary to provide customers with the information required to enforce §§ 201 and 202, and the rate averaging requirement of § 254(g), and the FCC adopted alternative means of enforcing these requirements. *Id.* at 20,745-46 (¶ 25) & 20,776 (¶ 84).

The FCC also found that the public interest required banning the filings of tariffs. It primarily relied upon the ground that banning tariffs would halt application of the so-called "filed-tariff doctrine" that is mandated by § 203(c) of the Act and that fictitiously presumed that customers have knowledge of the terms of filed tariffs. *Id.* at 20,762 (¶ 55). This doctrine had harsh consequences of binding customers to different rates, terms, and conditions than carriers had promised them orally or in writing. *Id.* at 20,754 (¶ 45) n.122 (citing *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)). Because customers were presumed to know all a carrier's tariffed rates and terms, the doctrine had been further held to preclude suits seeking prospective injunctive relief against deceptive advertising. *Marcus* v. *AT&T Corp.*, 138 F.3d 46, 64-65 (2d Cir. 1998).

The FCC emphasized that, in a detariffed regime, carriers would provide customers with actual notice of the rates, terms, and conditions on which the carriers offered service,

and customers would have to take steps sufficient to accept these offers under state contract law before the customer would be bound to them. The FCC anticipated this requirement would impose only modest costs on carriers, for they could enter into contracts with the nation's millions of residential customers by mailing "short, standard-form contracts." *Interstate, Interexchange Marketplace*, 11 FCC Rcd. at 20,763 (¶ 57). The FCC stated that if that assumption proved incorrect, the FCC would consider reimposing tariffing obligations. *Id.* at 20,767 (¶ 64).

Nowhere in the *Second Report and Order* did the FCC forbear from enforcing the substantive requirements of §§ 201 and 202 and authorize state-by-state variations in rates, terms, and conditions of interstate services. To the contrary, the FCC stated that its "decision to forbear from requiring nondominant interexchange carriers to file tariffs for interstate, domestic interexchange services will not affect such carriers' obligations under Sections 201 and 202" (*id.* at 20,746-47 (¶ 27)) and will not prevent the effective enforcement of the interstate rate averaging requirements of § 254(g). *Id.* at 20,776 (¶ 84).

At the same time, however, the FCC had also stated that "[i]n the absence of such tariffs, consumers . . . w[ould] also be able to pursue remedies under state consumer protection and contract laws." *Id.* at 20,753 (¶ 42). To prevent any future claim that the *Second Report and Order* authorized state regulation of the rates, terms, or conditions of interstate long distance services, AT&T petitioned for clarification of this aspect of the FCC's Order.

In its *Order on Reconsideration*, the FCC described AT&T's petition as a request that the FCC "clarify that federal, and not state, law governs the determination as to whether a nondominant interexchange carrier's rates, terms, and conditions . . . are lawful." *Interstate, Interexchange Marketplace*, 12 FCC Rcd. at 15,056 (¶ 76). As the FCC stated, AT&T's contention was that any other result "is

foreclosed by numerous judicial decisions recognizing that sections 201 and 202 of the Communications Act preempt state law with respect to the reasonableness of rates, terms, and conditions for interstate telecommunications services." *Id.* Sprint and WorldCom supported AT&T's petition.

The FCC granted AT&T's petition. *Id.* at 15,057 (¶ 77). After reiterating its prior statements that detariffing "will not affect" §§ 201 and 202, the FCC stated:

> We therefore agree with AT&T, Sprint, and WorldCom that the Communications Act continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory. While the parties only sought clarification that the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions, we note that the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the *Second Report and Order*, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.

Id. The FCC's *Detariffing Orders* were upheld on appeal. *MCI Worldcom Network Servs., Inc.* v. *FCC*, 274 F.3d 542 (D.C. Cir. 2001).

Thereafter, the FCC set August 1, 2001, as the effective date for detariffing.

5. AT&T's Consumer Services Agreement. To implement its detariffing obligations, AT&T developed a national Consumer Services Agreement ("CSA") that set forth the rates, terms, and conditions on which AT&T offers interstate long distance service to residential subscribers throughout the nation. In May and June of 2001, AT&T mailed each of its 40 million customers a copy of the CSA together with an

explanatory cover letter and a set of anticipated "Frequently Asked Questions" (FAQs). AT&T's mailing told its customers that their use of AT&T's interstate long distance service on or after August 1, 2001 would constitute their "acceptance" of the rates, terms, and conditions that AT&T offered in the CSA. ER 398-406.

The CSA contains ten separately numbered and captioned sections, with some terms emphasized in upper-case letters and/or bold print. ER 400-01. Two of these sections were challenged below and invalidated in whole or in substantial part by the Ninth Circuit.

Section 4, captioned "**LIMITATIONS OF LIABILITY**," sets forth limitations on consumers' damages remedies. *Id.* It, among other things, limits AT&T's liability for negligence by barring any awards of indirect or consequential damages, by limiting damages for harm to persons or property to direct damages, and by limiting damages for other injuries to the amount of AT&T's charges for its services. AT&T intended Section 4 to carry forward the same limitations on liability for negligence that had previously been set forth in AT&T's tariffs and that the FCC had previously approved. *AT&T Co.*, 76 F.C.C.2d 195, 197 (¶ 5) (1980). ER 31, 35-38, 923-24.

Section 7 is entitled "**DISPUTE RESOLUTION**." Although it preserves the right of consumers to file complaints with the FCC or to bring actions in small claims court, it provides that any other disputes must be resolved through arbitration. Section 7 expressly provides that "[n]o disputes may be joined" "with a dispute of another person" or "resolved on a class-wide basis." ER 401, 434. Section 7 also sets a limitations-period of two years for bringing claims, provides for AT&T's payment of all but $20 of the costs of arbitration claiming less than $1,000 (later increased to $10,000), and provides that arbitrations will be confidential. ER 400, 434-35.

Arbitration clauses (including class action bans) had been adopted in the tariffs of some of AT&T's long distance competitors prior to the effective date of the FCC's *Detariffing Orders*. However, AT&T did not adopt these provisions until the effective date of these *Orders*. In AT&T's cover letter to its customers and in the accompanying list of anticipated frequently asked questions, AT&T identified the arbitration requirement as a new term of AT&T's service. ER 398-99.

6. The Proceedings Below. On July 31, 2002, plaintiffs Darcy Ting (an AT&T customer) and Consumer Action (a membership organization) instituted an action in California Superior Court to enjoin the enforcement of the Consumer Services Agreement against California residents. Plaintiffs contended that AT&T had taken insufficient steps to make the CSA a binding contract with AT&T's long distance customers under California law and that even if a contract had been formed, Sections 4 and 7 of the CSA were unlawful.

Plaintiffs did not contend that Sections 4 and 7 were "unjust, unreasonable, and discriminatory" in violation of §§ 201 or 202 of the Communications Act or any other provision of federal law.[2] Rather, they contended that the provisions were unconscionable under California law because they were contracts of adhesion and were one-sided. Plaintiffs also contended that the CSA's provisions violated the antiwaiver provision of the California Consumer Legal Remedies Act and the public policy of California.

AT&T removed the case to the United States District Court for the Northern District of California. In addition to

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[2] The FCC's rules specifically allow customers and carriers to agree to resolve disputes through arbitration. 47 C.F.R. § 1.18. The FCC has further concluded that the right of customers to file individual complaints before the FCC protects all their legitimate interests, and the FCC refused to authorize complaints to proceed as class actions because that would be inconsistent with the remedial scheme of the Act. *Krauss* v. *MCI Telecomms. Corp.*, 14 FCC Rcd. 2770, 2775-76 (¶ 10) (1999).

contending that state law is completely preempted by §§ 201 and 202 of the Communications Act, AT&T relied on the fact that the case could have been brought in federal district court under diversity of citizenship jurisdiction (28 U.S.C. § 1332) and that AT&T is not a citizen of California. *Id.* § 1441(a) & (b); see ER 23-28.

AT&T demonstrated that its CSA mailing had provided California customers with sufficient notice of the CSA to cause their subsequent use of the service to constitute acceptance of an offer and to form a contract under California state law. But AT&T contended that §§ 201 and 202 governed the lawfulness of Sections 4 and 7 of the CSA and preempted plaintiffs' substantive state law challenge to these limitation of liability and consumer remedies provisions.

Following a trial, the District Court entered an injunction that generally treated the CSA as a validly formed contract. However, it rejected AT&T's federal preemption claims (App. 100a-105a), and it held that Sections 4 and 7 violated state law.

First, the District Court held that the limitation of liability clause of Section 4 covered not just negligence (as AT&T contended) but also violated California law by limiting liability for willful misconduct. Because the Court concluded it had no authority under state law to "rewrite or reform" Section 4, it enjoined its application entirely. App. 77a-83a. Under the court's order, there is no limitation on AT&T's liability to California customers for consequential or economic damages caused by negligence from August 1, 2001 until AT&T adopted a new limitations of liability clause in response to the District Court.

Second, the District Court found that the arbitration provisions of Section 7 of the CSA, including the class action prohibition, were unconscionable because the CSA is an adhesion contract and these provisions are one-sided. After finding that individual FCC complaints were not an adequate

remedy for consumers (App. 71a), the District Court found the class action prohibition one-sided and oppressive because it would "serve to shield AT&T from liabilit[ies]" it would incur if there were no such ban. *Id.* at 68a, 91a-92a. It found the cost provisions one-sided because the District Court hypothesized claims in which customers would incur greater fees in arbitration than would be incurred in court cases. *Id.* at 96a-98a. While the District Court found that the two-year limitation period was not unconscionable, it invalidated that term under the anti-waiver provisions of the California Consumer Legal Remedies Act. *Id.* at 84a.

7. The Ninth Circuit's Decision. While it held that the two-year limitations period is valid, the Ninth Circuit upheld the District Court's invalidation of the CSA's limitation of liability clause and its arbitration requirements and class action ban. The court acknowledged that AT&T's preemption claims were accepted in *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002) and that the Seventh Circuit had enforced the CSA's legal remedies provisions after dismissing state law unconscionability challenges to them. But the Ninth Circuit "respectfully disagreed" with the Seventh Circuit, and the Ninth Circuit rejected AT&T's preemption claims on two alternative grounds. App. 11a.

First, it held that AT&T's preemption claim is contrary to the "text and structure" of the Communications Act of 1934 and "the clear intent of Congress in the Telecommunications Act of 1996." App. 11a. It concluded that the decisions holding that the Communications Act (and the Interstate Commerce Act) preempt state law challenges to rates, terms, and conditions of interstate communications (and transportation) services rested solely on the existence of tariffs, and that, absent a tariff, state law invalidations of the terms and conditions for a rate do not constitute unreasonable preferences in violation of § 202(a). *Id.* at 16a-25a. It further held that the 1996 Act's "chosen means" of enforcing §§ 201 and 202 is to "deregulate" the services and rely on marketplace

forces which, the Ninth Circuit held, include the operation of state laws of general applicability. *Id.* at 22a-32a.

Second, the Ninth Circuit held, in the alternative, that AT&T's preemptive claim was foreclosed by the District Court's findings of fact. The Ninth Circuit relied on the District Court's conclusion that AT&T had failed to prove that class action and other lawsuits would increase AT&T's costs of service and, if so, by how much, and the court held that the absence of such evidence foreclosed any claim that the invalidation of the provisions created preferences in favor of California customers. App. 32a-33a.

Finally, the Ninth Circuit held that the CSA's limitation of liability and consumer remedies provisions are unconscionable under California law, which required findings that the CSA is both "procedurally" and "substantively" one-sided and unfair. The court held that the procedural prong was satisfied because the CSA is an adhesion contract and because virtually all long distance carriers have similar provisions App. 36a-37a. The court held the substantive prong was satisfied because the CSA's provisions were not "reciprocal" as a practical matter because, for example, they barred plaintiffs from bringing class actions against AT&T, whereas AT&T would have little reason to pursue judicial claims against a class of its customers. *Id.* at 37a-42a.

REASONS FOR GRANTING THE PETITION

Review of the Ninth Circuit's decision is manifestly appropriate. First, it creates a square and acknowledged conflict with the Seventh Circuit not only on the broad questions of the preemptive effect of §§ 201 and 202 of the Communications Act following detariffing, but also on the specific question of the validity of the remedial provisions of AT&T's national Consumer Services Agreement. Second, the Ninth Circuit's decision conflicts with prior decisions of this Court, which establish that the Seventh Circuit is right

and the Ninth Circuit is wrong. Finally, the issues have importance beyond AT&T and its 40 million interstate long distance customers. The Ninth Circuit's decision would invalidate the comparable provisions in the contracts of virtually all of the nation's major long distance carriers. It would also subvert the FCC's policy of allowing marketplace forces to determine the rates, terms, and conditions of interstate service, subject to FCC intervention only in the event of market failures.

I. THE NINTH CIRCUIT DECISION SQUARELY CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION IN *BOOMER* v. *AT&T*.

Foremost, as the Ninth Circuit expressly acknowledged (App. 10a-11a), its decision conflicts with *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). Two courts of appeals have now squarely disagreed over the meaning of the FCC's *Detariffing Orders* and the preemptive effect of §§ 201 and 202 of the Communications Act in a detariffed environment. They have also disagreed over the validity of the Legal Remedies Provisions of AT&T's Consumer Services Agreement. This has created the anomaly that a single national contract applicable to interstate services is enforceable under federal law (and immune from state law challenges) in one circuit and invalid under state law in another. It means that rates, terms, and conditions applicable to a single AT&T interstate call (*e.g.*, Chicago to San Francisco) now vary depending on where the call is billed.

The conflict could not be starker. The plaintiffs in this case and the plaintiffs in *Boomer* each contended that the Legal Remedies provisions of the CSA were unconscionable under state law. Each advanced identical arguments in contending that state law challenges to the CSA's rates, terms, and conditions were not preempted under §§ 201 and 202 of the Communications Act and the terms of the FCC's *Detariffing Orders*. Yet the two courts reached opposite conclusions, and

each offered extended and detailed analyses in support of their respective and opposite holdings.

The Seventh Circuit had previously held that the Communications Act preempted state law challenges to arbitration clauses (including class action bans) that were set forth in tariffs and that these clauses are valid and must be enforced unless and until the FCC finds they violate §§ 201 or 202 of the Act. *Metro East Ctr.* v. *Qwest Communications Int'l, Inc.*, 294 F.3d 924 (7th Cir.), *cert. denied*, 123 S. Ct. 707 (2002). In *Boomer*, the Seventh Circuit held that §§ 201 and 202 of the Act continue to preempt state law challenges to these provisions now that they are set forth in contracts, for three independent reasons. 309 F.3d at 418-21.

First, it held that the object of §§ 201 and 202 was to achieve uniform rates, terms, and conditions for interstate telecommunications services and that allowing state law challenges to terms and conditions would result in state-by-state differences among similarly situated customers, contrary to § 202(a)'s prohibition against unreasonable preferences for any class of customers or locality. *Id.* at 418. Second, it concluded that arbitrations and class action bans produce cost savings for carriers that are passed through to consumers in the form of lower rates, and that to allow state law injunctions against these provisions would inevitably result in either price differences from state to state or in price discrimination among otherwise similarly situated customers that violates § 202(a). *Id.* at 419-20. Third, the Seventh Circuit held that, in this context, § 201(b) shows that Congress intended that federal law would exclusively govern the question whether rates, terms, and conditions of service are fair and reasonable and preempt unconscionability and other state claims that address the same ultimate questions under state law standards. *Id.* at 420-21.

The Seventh Circuit rejected claims that the preemptive effect of the Communications Act depended upon the existence of tariffs or on the applicability of the filed rate

doctrine. *Id.* at 421-22. It further held that the FCC's *Order on Reconsideration* established that state law in no way applies to determinations of the lawfulness of rates, terms, and conditions of interstate services. *Id.* at 423.

The Ninth Circuit has now "respectfully disagreed" with all of the Seventh Circuit's conclusions, calling them "novel." App. 10a-11a. The Ninth Circuit held that the only circumstance in which the Communications Act preempts state law is where tariffs are required or permitted and the filed tariff doctrine applies. *Id.* at 17a-18a. It held that, absent tariffs, a state law injunction that exempts its citizens from the rates, terms, and conditions of a national interstate service does not result in unreasonable preferences for a locality that violate § 202(a). *Id.* at 16a-25a. To the contrary, the Ninth Circuit held that state-by-state variations in results are dictated by the 1996 Act which purportedly "deregulated" interstate services and thereby necessarily provided that §§ 201 and 202 would be enforced by applying the laws of 50 different states to establish the rates, terms, and conditions that would govern long distance services in each state. *Id.* at 24a-27a. The Ninth Circuit treated the FCC's grant of AT&T's petition for clarification that §§ 201 and 202 would continue to govern these issues as confirming this role for state law. *Id.* at 28a.

Finally, the Seventh Circuit had held as a matter of law that limitation-of-liability provisions and arbitration requirements and class action bans affect a carrier's costs and rates, such that a state law injunction against these provisions would necessarily result in price discrimination and lead to unreasonable preferences. *Boomer*, 309 F.3d at 419-20. But the Ninth Circuit concluded that the Seventh Circuit's decision to so hold in the absence of a "factual record" was improper and that the District Court's findings here established that invalidating the limitations of liability and consumer remedies provisions had no such effects. App. 32a-33a.

These conflicting legal holdings – and the fact that important provisions of a single national contract are valid in some states but not in others – make review by this Court a matter of great importance. In this regard, because the Seventh and Ninth Circuit's have sharply framed the issues in detailed opinions that reach opposite results, the question presented in this case is manifestly now ripe for this Court's consideration and decision.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND IS CLEARLY WRONG.

Even apart from the square conflict with the Seventh Circuit's decision in *Boomer*, this case merits plenary review because the Ninth Circuit's decision also conflicts with the prior decisions of this Court. They establish that the Seventh Circuit is right and the Ninth Circuit is wrong.

First, the Ninth Circuit's decision primarily rests on its view of the "text and structure" of the Communications Act of 1934. App. 11a. It held that the only provision of the Communications Act that preempts state law is § 203, and the "filed rate doctrine" that implements it. But this holding has been squarely rejected by nearly a century of decisions of this Court that hold that the terms of §§ 201 and 202 independently preempt state law challenges to the rates, terms and conditions of interstate services, whether or not the carrier is subject to the tariffing requirements of § 203.

These decisions reject the Ninth Circuit's conclusion that the text of the Act gives § 203 a "preemption function" but merely gives §§ 201 and 202(a) an "antidiscrimination function." App. 18a. In this regard, the so-called "filed tariff doctrine" was compelled by the text of § 203(c), which prohibits carriers from providing services at rates, terms, or conditions that are not "specified" in its tariff. This provision was held to preempt state law that would invalidate tariffed limitations on liability because state laws cannot require what

federal law prohibits. *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998). Section 202(a) of the Act, in turn, prohibits carriers from extending unreasonable preferences to any class of customers or localities, and the Court has thus held that the Act also preempts state-law claims that "constitute unlawful preferences." *Id.*

Indeed, this Court repeatedly so held during a prior period when telephone and telegraph carriers were subject to the same regulatory regime that applies to them now by virtue of the FCC's *Detariffing Orders*. Between 1910 and 1934, as now, telecommunications carriers were exempt from tariffing requirements and were subject to the statutory prohibitions against unjust and unreasonable rates, terms, and practices (now codified in § 201(b)) and against undue or unreasonable preference or advantages for any class of customers or locality (now codified in § 202(a)). This Court then held that these latter provisions invalidated state law challenges not just to rates, but also to contractual provisions that limit a carrier's liability to its customers and that had been challenged as unconscionable or contrary to public policy under state law.

In *Postal Telegraph-Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27 (1919), there was no tariff, and a customer brought a state law challenge to a "contract" that limited the carrier's liability for missending a message. *Id.* at 29. The Court held that the Act of Congress that required telegraph carriers to adhere to the requirements now codified in §§ 201 and 202 was "clear[ly] . . . designed" to subject telegraph companies to the "rule of equality and uniformity of rates" and that the Act's purpose would be "wholly destroyed" if the substantive lawfulness of the terms of contracts made in their interstate business were subject to state laws that inevitably may be "divergent" and "conflicting." *Id.* at 30. It held that the predecessors of §§ 201 and 202 were "an occupation of the field by Congress." *Id.* at 31.

Similarly, in *Western Union Telegraph Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921) (Brandeis, J.), a telegraph carrier's

limitation on liability was invalidated under state law, and the Court reversed because state law had "grant[ed] an undue preference or advantage" in violation of the predecessor to section 202(a) of the Act. *Id.* at 571.

The Ninth Circuit tried to distinguish these cases on the ground that the ICA purportedly contained requirements governing "voluntary" tariff filings. App. 19a. That is incorrect. There was no such provision in the ICA, and while a tariff was voluntarily filed in *Esteve Brothers*, there was none in *Postal Telegraph*. More to the point, there was no statutory basis for giving preemptive effect to any voluntary tariffs, for the ICA's tariffing requirements and the ban on deviations from filed tariffs were then inapplicable to telecommunications carriers.

Thus, it had been "strongly argued" in *Esteve Brothers* that the limitation on liability clause could be subject to state law challenges because telegraph carriers had the right to provide service "without filing tariffs with the Commission." 256 U.S. at 572-73. But Justice Brandeis's opinion for the Court held that the absence of tariff filing requirements was immaterial to the preemptive effect of the Act. It concluded that tariff filings are merely "procedural features" of the Act that create the "fiction" that customers have "constructive notice" and that bind customers to the tariffed terms "whether there is knowledge of [them] or not." *Id.* at 573. It held that the preemptive effect of the Act "flows" not from the filing of the tariffs, but "from the requirement of equality and uniformity of rates laid down in § 3 of the [ICA]" (now § 202(a) of the Communications Act). *Id.*

Further, this Court has also held that even when limitation of liability clauses are set forth in tariffs, state law challenges to them are independently preempted *both* by the terms of § 203(c) and by § 202(a)'s ban on unreasonable preferences. *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155, 165 (1912) (state law claim for better terms than those in the tariff is preempted both by § 6 of the ICA (predecessor to § 203)

because terms were not "published in the tariffs," *and* by § 3 of the ICA (predecessor to § 202(a)) "because it is an undue advantage" not available to all similarly situated customers); *Davis* v. *Cornwell*, 264 U.S. 560, 562 (1924) (same).

AT&T Co. v. *Central Office Tel., Inc.*, 524 U.S. 214 (1998) ("*COT*") followed these decisions and held that tariff filings are not the sole source of state-law preemption. As the Ninth Circuit correctly states (App. 19a), this Court there applied the filed-tariff doctrine to reject COT's claim that it could bring state contract and tort claims to obtain "privileges" not specified in the applicable tariffs. 524 U.S. at 224-26. But the Ninth Circuit ignored that COT also argued, in the alternative, that its state-law claims were "consistent" with the tariffs because it authorized state claims based on willful misconduct. *Id.* at 228. The Court held that while such a state claim is not barred by the filed-tariff doctrine, it is barred by the FCA's separate ban on "preferences" (*id.*) which is contained in § 202(a). It "renders the promise of preferences unenforceable." *Id.*

These decisions also foreclose the Ninth Circuit's reliance on the ground that § 202(a) does not mandate "strict uniformity," but prohibits only "unjust or unreasonable" preferences. App. 19a-21a, 28a-30a. The Ninth Circuit here noted the FCC and other decisions that upheld rate differences that were justified by differences in competitive conditions and other such neutral rational factors. *Id.* But the decisions hold that § 202(a) requires that identical rates, terms, and conditions be extended to all customers facing similar competitive and other conditions, regardless of the state in which they reside,[3] and *Postal Telegraph*, *Esteve Brothers*, *Davis*, *Kirby*, and *COT* all reject the Ninth Circuit's holding that preferences that result from the operation of state law are "reasonable" and lawful under § 202(a).

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[3] *See, e.g.*, *Interstate, Interexchange Marketplace*, 11 FCC Rcd. at 9576-78 (¶¶ 24 & 27-28); *Interstate, Interexchange Marketplace*, 6 FCC Rcd. 5880, 5900-01 (¶¶ 112 & 116) (1991).

Further, this Court's decisions also foreclose the Ninth Circuit's alternative holding that California law could not be held to create a preference because AT&T purportedly had not introduced evidence that invalidation of the limitation of liability and consumer remedy provisions would increase AT&T's costs and rates and if so, by how much. App. 32a. There was no such evidence in *Postal Telegraph*, *Esteve Brothers*, *Davis*, *Kirby*, and *COT*, and this Court there held that limitations of liability provisions and other conditions that carriers impose on the availability of a rate are "inherent part[s] of the rate." *Esteve Bros.*, 256 U.S. at 571. In particular, the Court held that it was sufficient to establish an unreasonable preference that the plaintiff was seeking to use state law to confer an advantage that "affects the value of the service to the [customers] and its cost to the carrier" and that is something for which a carrier "might" justify a higher rate. *Kirby*, 225 U.S. at 165.

Here, moreover, one of the invalidated provisions of the CSA (Section 4) is the same limitation of liability clause that the Court specifically held to be an "inherent part" of the rate in *Esteve Brothers*. And it is self-evident – as the district court specifically found – that the arbitration clause and class action ban of the CSA operate to reduce AT&T's costs and to "shield" AT&T from substantial liabilities that it would otherwise incur. App. 67a-68a. For example, the class action ban inherently prevents awards of damages to customers who have not availed themselves of the costless right to file a complaint under § 208 of the Act that the FCC is required to investigate and prosecute or to pursue other remedies under the CSA. Under this Court's decisions, state law exemptions from the foregoing provisions are unreasonable preferences as a matter of law – as the Seventh Circuit correctly held in *Boomer*, 309 F.3d at 423.

Second, the Ninth Circuit's holding also rests on its view that the "clear intent" of the Telecommunications Act of 1996 requires allowing state law challenges to the rates, terms, and

conditions of interstate services. App. 11a. But this holding, too, conflicts with this Court's decisions, and is simply wrong.

The Ninth Circuit's holding principally rests on a misreading of this Court's decision in *MCI Telecommunications Crop.* v. *AT&T Co.*, 512 U.S. 218 (1994). Because this Court held that tariffs were Congress's "chosen means" of enforcing §§ 201 and 202 under the 1934 Act, the Ninth Circuit concluded that §§ 201 and 202 will be unenforceable under the detariffed regime authorized by the 1996 Act unless state law is allowed to impose just and reasonable arrangements. App. 22a-25a. But contrary to the Ninth Circuit, the Court's opinion in *MCI* v. *AT&T* expressly stated that it was *not* holding that it would "frustrate" the "ultimate purposes" of §§ 201 and 202 to end tariffing and to rely on marketplace forces and FCC complaints to enforce these provisions. 512 U.S. at 231 n.4. Rather, the Court held that because tariffs were then Congress's prescribed "means" of enforcing the provisions, the FCC could not then eliminate them even if §§ 201 and 202 would be adequately enforced through other means. *Id.*

The Ninth Circuit also confused two different sets of provisions that were enacted by the 1996 Act. The Ninth Circuit stated that the 1996 Act had the objective of "replac[ing] the old monopoly-based regime" with a system of deregulation that depends on market-based mechanisms and the operation of state law. App. 22a. The Ninth Circuit here cited to the legislative history and terms of the local competition provisions enacted by the 1996 Act (47 U.S.C. §§ 251-261), which govern local and other *intrastate* services that had been regulated exclusively by states, that had been monopolies, and that will continue otherwise to be subject to state law after new procompetitive federal requirements are fully implemented. See App. 26a (citing *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646 (2002)). These provisions do not apply to *interstate* long distance services, which

had been subject to exclusive FCC jurisdiction and which were competitive when the 1996 Act was passed.

Rather, the 1996 Act altered the regulation of *interstate* long distance services in only two respects. Neither evinced any intent that state law would govern the rates, terms, and conditions of these services. First, by enacting § 254(g) and mandating nationally uniform interstate rates, Congress plainly was not authorizing the state-by-state variations that the Ninth Circuit's holding would create, and the FCC's implementing rules require identical rates for all similarly situated customers, "regardless of their geographic location." *Interstate, Interexchange Marketplace*, 11 FCC Rcd. at 9576-77 (¶¶ 24 & 27).

Second, while the Act grants the FCC the authority to "forbear" from applying any provision of the Act, Congress limited this forbearance authority to conditions in which the FCC found that the requirement is not necessary to assure that rates, terms, and conditions of service are just, reasonable, and nondiscriminatory and that forbearance is in the public interest. 47 U.S.C. § 160(a). As the Seventh Circuit held, this provision establishes that, if anything, the FCC is prohibited from forbearing from enforcing §§ 201 and 202 and allowing state-by-state variations in rates, terms, and conditions of interstate services by turning these matters over to state law. *Boomer*, 309 F.3d at 423. But that issue need not be reached here because the FCC exercised its forbearance authority only over § 203. Thus, even if the FCC had said nothing else on the subject, its orders would not have affected the enforcement of §§ 201 and 202, and they would have continued to preempt state law challenges to limitations of liability clauses and other rates, terms, and conditions of interstate services.

But the FCC did more. In granting AT&T's petition for clarification on this precise issue, the FCC "agreed" with AT&T that the lawfulness of the rates, terms, and conditions of interstate long-distance services would continue to be

governed by §§ 201 and 202 and that state law could only govern other issues that arose because of detariffing, such as contract formation. For the reasons stated above, this interpretation of the Act was compelled by the Act's terms and structure and by *Esteve Brothers* and other prior decisions of this Court that so interpret this same language in the absence of a tariff-filing requirement. See *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). But even if the Act were ambiguous, the FCC's order plainly adopted a reasonable interpretation, to which the Ninth Circuit would have been required to defer even if the Ninth Circuit had reviewed the FCC's order on direct appeal. *Chevron USA, Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Here, moreover, the Ninth Circuit did not review the FCC's order directly. Instead, it has effectively collaterally attacked the FCC's rules and its interpretation of the Act in a subsequent proceeding that challenged AT&T's implementation of these rules – based on the Ninth Circuit's mistaken view that the 1996 Act required a greater role for state law than afforded it by the FCC's *Detariffing Orders*. This is flatly improper.

III. UNLESS REVERSED, THE NINTH CIRCUIT'S DECISION WILL ADVERSELY AFFECT THE ENTIRE LONG DISTANCE INDUSTRY AND SUBVERT THE FCC'S REGULATION OF IT.

Finally, review of the Ninth Circuit's decision is a matter of national importance for other reasons. Unless reversed, the Ninth Circuit's decision will adversely affect the entire long distance industry and subvert the FCC's regulation of it.

First, the provisions of the CSA that the Ninth Circuit invalidated are comparable to the terms and conditions of the long distance services of many other long distance carriers. App. 60a. In particular, all of the nation's major long distance carriers have adopted standard form contracts and most contain some form of requirement that residential

customers arbitrate complaints that are not brought before the FCC and that prohibit class actions. *Id.* Under the Ninth Circuit's decision in this case, these provisions are all subject to challenge under the law of each state where each carrier operates, and would appear all to be plainly unlawful under the Ninth Circuit's interpretation of California law.

Notably, the fact that most long distance carriers have adopted these provisions reflects the operation of the very marketplace forces on which the FCC now relies, absent evidence of market failure, to assure that the rates, terms, and conditions of service are just and reasonable. Regardless of whether interstate services are governed by tariff or by contract, the FCC has found that competition will prevent carriers from charging rates that are excessive or from imposing terms and conditions that are unreasonable, and that competition assures that where customers waive rights or remedies, they will do so in exchange for receiving lower rates than would otherwise be charged. See *supra* pp. 5-8. Thus, the fact that most major long distance carriers have adopted arbitration requirements and class actions bans reflects widely shared judgments that customers of long distance services place no or little value on rights to judicial and class remedies and prefer the lower rates that waivers of these remedies allow.

In this regard, while the FCC has not had any occasion specifically to rule on the lawfulness of such arbitration clauses and class action prohibitions in post-detariffing contracts, these provisions had been included in the tariffs of some carriers prior to detariffing, and were never disapproved by the FCC. *Metro East Ctr.*, 294 F.3d at 927-28. Further, the FCC's regulations specifically authorize customers and carriers to agree to resolve disputes through arbitration. 47 C.F.R. § 1.18. In addition, the FCC has held that the right of customers to bring individual complaints under § 208 (which the FCC is statutorily required to investigate and prosecute) fully protects their legitimate interests and that allowing

customers to bring complaints as class actions would be inconsistent with the remedial scheme of the Act. *Krauss* v. *MCI Telecomms. Corp.*, 14 FCC Rcd. 2770, 2775-76 (¶ 10) (1999). As the Seventh Circuit stated, these precedents strongly indicate that the FCC would reject claims that contractual arbitration requirements and class action bans are unjust and unreasonable under § 201(b) of the Act. *Boomer*, 309 F.3d at 421.

Second, whatever the FCC might hold on that specific question, it is very clear that the Ninth Circuit's holding that the lawfulness of the rates, terms, and conditions of interstate services can be governed by state unconscionability standards will subvert the FCC's regulation of competitive interstate services. State law unconscionability standards are fundamentally different than and incompatible with the standards that the FCC applies in determining if arrangements are unjust and unreasonable under § 201(b).

Here, for example, the Ninth Circuit held that the CSA's provisions are unconscionable because the CSA was a form contract that was not individually negotiated, because most long distance carriers had comparable provisions, and because the provisions were not reciprocal in the sense that the arbitration clause and class action ban – viewed in isolation – did not have the same practical effect on AT&T as it did on customers. App. 36a-42a. But under the FCC's standards, these factors are either irrelevant or powerful evidence of the reasonableness of the arrangement.

First, the fact that a provision is in a form contract (or tariff) has no significance under the FCC's policies. Mass market services were formerly governed by tariffs that customers never saw, and all mass market services inherently use form agreements. As other evidence and studies establish,[4] the FCC has found that competition in mass market

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[4] *See, e.g.*, Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L.J. 1297, 1319-47 (1981); ER 352-56, 388-90.

services will generally preclude the imposition of unfair or exploitive arrangements, whether or not form contracts are used. Second, under the FCC's policies, the fact that virtually all carriers in the competitive long distance market have similar provisions is – absent some evidence of market failure – conclusive or powerful evidence of their reasonableness. See *Metro East Ctr.*, 294 F.3d at 927. Third, the fact that an individual contractual term – viewed in isolation – has a greater practical effect on customers than carriers is irrelevant to its reasonableness under the FCC's policy. The FCC recognizes – as California law does not (in the Ninth Circuit's view) – that customers in competitive markets will be compensated for any relative disadvantage that results from a particular contractual provision in the form of lower rates for the overall service. *Id.*

Under the Ninth Circuit's view, California law would categorically preclude any term that is adopted in a form agreement, that is a feature of most competitors' services, and that is not "reciprocal" under the Ninth Circuit's narrow definition of that concept. For this reason, regardless of what the FCC might conclude about the lawfulness of the specific challenged provisions of AT&T's Consumer Services Agreement, the Ninth Circuit's decision that state law governs the lawfulness of such terms inevitably would result in the invalidation of a range of contractual provisions that the FCC would find to foster the public interest, to benefit consumers, and to be lawful under federal standards. This is an additional reason why review of the Ninth Circuit's decision is manifestly appropriate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 16, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-15416.

DARCY TING, individually and on behalf of all others similarly situated; CONSUMER ACTION, a non profit membership organization, both as private attorneys general,
Plaintiffs-Appellees,

v.

AT&T, a New York corporation,
Defendant-Appellant.

Argued and Submitted Oct. 7, 2002
Filed Feb. 11, 2003

Appeal from the United States District Court for the Northern District of California; Bernard Zimmerman, Magistrate Judge, Presiding. D.C. No. CV-01-2969-BZ.

Before: TASHIMA, THOMAS, and PAEZ, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

Darcy Ting, individually and on behalf of all others similarly situated, and Consumer Action, a non-profit membership organization, both as private attorneys general, brought suit against AT&T, alleging that AT&T's Consumer Services Agreement ("CSA") violates California's Consumer Legal Remedies Act and that state's Unfair Practices Act by barring customers from, among other things, pursuing claims against AT&T on a classwide basis. Finding the CSA un-

conscionable and in violation of California public policy, the district court[1] issued a permanent injunction against enforcement of sections 4 and 7 of the CSA. *See Ting v. AT&T*, 182 F.Supp.2d 902 (N.D.Cal.2002). AT&T appeals on the ground that the application of California's consumer protection laws is preempted by the Federal Communications Act and the Federal Arbitration Act. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse in part.

BACKGROUND

Congress enacted the Federal Communications Act ("Communications Act" or "1934 Act") in 1934. 48 Stat. 1064 (codified, as amended, at 47 U.S.C. § 151, *et seq.*). At the time, AT&T enjoyed a virtual monopoly over the nation's telephone service industry. The 1934 Act was intended to address the unique problems inherent in a monopolistic environment. It required telecommunications carriers to file with the Federal Communications Commission ("FCC" or "Commission") a list of tariffs, or "schedules," showing "all charges . . . and . . . the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). The Communications Act prohibited carriers from "extend[ing] to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified" in a carrier's filed tariffs. 47 U.S.C. § 203(c). "The goal of these provisions [was] to ensure that all purchasers of communications services receive[d] the same federally regulated rates." *ICOM Holding, Inc. v. MCI Worldcom, Inc.*, 238 F.3d 219, 221 (2d Cir.2001) (citing *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 229-30, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)).

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[1] The parties consented to the jurisdiction of a magistrate judge over all proceedings, including the entry of judgment, pursuant to 28 U.S.C. § 636(c)(1).

To ensure that all service providers and their customers complied with the tariff, courts developed the "filed rate doctrine," which prohibited a regulated entity from charging rates for its services other than those specified in its duly filed tariff. *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998). Under this rule, rates filed with the FCC bound both "carriers and [customers] with the force of law." *Lowden v. Simonds-Shields Lonsdale Grain Co.*, 306 U.S. 516, 520, 59 S.Ct. 612, 83 L.Ed. 953 (1939); *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir.2002). The rights and liabilities defined by the tariff could not be "varied or enlarged by either contract or tort of the carrier." *Cent. Office*, 524 U.S. at 227, 118 S.Ct. 1956 (quoting *Keogh v. Chicago & Nw. Ry.*, 260 U.S. 156, 163, 43 S.Ct. 47, 67 L.Ed. 183 (1922)). Therefore, federal law preempted any state-law claim seeking to enforce a contractual provision that differed from a filed rate. *ICOM Holding*, 238 F.3d at 221.[2]

Because courts applying the filed rate doctrine presumed customers had knowledge of filed rates and, in turn, prohibited customers from relying on promises of any other charge, the filed rate doctrine, in practice, led to "quite unjust" results. *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 491 (2d Cir.1998); *see also Maislin Indus., U.S., Inc., v. Primary Steel, Inc.*, 497 U.S. 116, 127, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). "'[T]his rule is undeniably strict and it obviously may work hardship in some cases' but . . . [strict liability] 'embodies the policy which has been adopted by Congress in the regulation of interstate commerce

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[2] *See also Cahnmann v. Sprint Corp.*, 133 F.3d 484, 489 (7th Cir.1998) ("[S]ince the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce."), *overruled in part by Boomer v. AT&T Corp.*, 309 F.3d 404, 424 (7th Cir.2002) ("[U]nder the new detariffed regime federal law no longer completely preempts state law.").

in order to prevent unjust discrimination.'" *Milne Truck Lines, Inc. v. Makita, Inc.*, 970 F.2d 564, 569 (9th Cir.1992) (quoting *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97, 35 S.Ct. 494, 59 L.Ed. 853 (1915)). Consequently, in applying the filed rate doctrine, courts universally precluded the application of equitable doctrines to vary the terms of the filed rate. *See Cent. Office*, 524 U.S. at 222, 118 S.Ct. 1956; *Ill. Cent. Gulf R.R. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir.1978).

By the late 1970's, technological advances and increased competition had reduced the entry costs for AT&T's competitors in the telecommunications market, and some began to argue that the continuation of extensive tariff filing only imposed unnecessary costs on new entrants and facilitated collusive pricing. *MCI*, 512 U.S. at 220-21, 114 S.Ct. 2223. Starting in the early 1980's, the FCC tried to prohibit tariff-filing by non-dominant carriers (*i.e.*, those other than AT&T) on the ground that "market forces and the administration of the complaint process" could guarantee reasonable rates without the lure of collusive pricing incentives inherent in the filed rate mechanism. Sixth Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services, 99 F.C.C.2d 1020, 1029 (1985). But the courts rejected "mandatory detariffing" as inconsistent with the terms of the Communications Act. *See MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1193 (D.C.Cir.1985) (holding that the Commission lacked statutory authority to prohibit the filing of tariffs). Then, in 1994, the Supreme Court held that because of the "enormous importance to the statutory scheme of the tariff-filing provision," the FCC's policy of "permissive detariffing" was not a valid "modification" under 47 U.S.C. § 203. *MCI*, 512 U.S. at 231, 114 S.Ct. 2223. As a result, following a 15 year effort to suspend the tariff-filing obligations for telecommunication carriers, the Commission was forced to wait for Congress to act.

The Telecommunications Act of 1996, Pub.L. No. 104-104, 100 Stat. 5, (codified as interspersed amendments to the Communications Act) ("1996 Act"), fundamentally altered the Communications Act's regulatory scheme. The 1996 Act effectively adopted the FCC's detariffing rationale. The purpose of the 1996 Act was "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. (100 Stat. 5) 124. The 1996 Act directed the FCC to:

> forbear from applying any regulation or any provision of this chapter if the Commission determines that—
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a).

Finally armed with the requisite congressional authorization, the FCC promptly issued a Notice of Proposed Rulemaking on March 25, 1996, to "forbear from applying" the tariffing requirements of § 203 of the 1934 Act. Notice of Proposed Rulemaking, 11 F.C.C.R. 7,141 (1996). In the Notice, the Commission tentatively concluded that tariffs were no longer necessary because market forces were sufficient to protect consumers from unjust and unreasonable rates, terms, and conditions. *Id.* at ¶¶ 30, 31 (concluding that removing filing requirement will promote competition and

prevent collusive pricing). Following a comment period, the FCC issued an order of mandatory detariffing on October 29, 1996, *see* Second Report and Order, 11 F.C.C.R. 20,730 (1996), thus confirming that "enforcement of the tariffing provision is neither necessary to ensure just and reasonable, non-discriminatory rates, nor necessary for the protection of consumers." *MCI WorldCom, Inc., v. FCC*, 209 F.3d 760, 763 (D.C.Cir.2000) (citing Second Report and Order, 11 F.C.C.R. 20,730, at ¶ 21).

Under mandatory detariffing, rather than having carriers file their rates, terms, and conditions with the FCC, the Commission required telecommunications carriers to establish contracts with consumers governing the rates, terms, and conditions of interstate long distance service. Policy and Rules Concerning the International, Interexchange Marketplace, FCC Docket No. 01-93, at ¶ 9 (2001). On December 23, 1996, AT&T filed a petition for limited reconsideration and clarification with the FCC, requesting, among other things, that the Commission clarify that neither the effect nor intent of the detariffing order was to subject the rates, terms, and conditions of interstate telecommunications services to state law. Order on Reconsideration, 12 F.C.C.R. 15,014, at ¶ 76 (1997). AT&T's petition suggested that parties may misinterpret the Second Report and Order's statement that "consumers will also be able to pursue remedies under state consumer protection and contract laws," as permitting challenges under state law to the lawfulness of rates, terms, and conditions for interstate services. *See id.* Specifically, AT&T argued that any other interpretation of the detariffing order should be foreclosed by "numerous judicial decisions recognizing that §§ 201(b) and 202(a) of the Communications Act preempt state law with respect to the reasonableness of rates, terms, and conditions for interstate telecommunications services." *See id.*

The Commission's response to the petition has led to considerable confusion. The FCC stated that while the Communications Act "continues to govern determinations as to whether rates, terms, and conditions of interstate . . . services are just and reasonable, and are not unjustly or unreasonably discriminatory . . . the [Communications Act] does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment." *Id.* at ¶ 77. The Commission added: "As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime." *Id.*

AT&T began implementing its detariffing obligation in the summer of 2000. AT&T's CSA included a series of provisions designed to limit customers' rights and remedies in the event of a dispute with AT&T.[3] These provisions are contained in sections 4 and 7 of the CSA and are collectively known as the "Legal Remedies Provisions." Section 4 limits AT&T's liability for claims other than negligence to the amount of charges for service during the affected period and precludes liability for punitive, reliance, special, and consequential damages. Section 7(a) mandates binding arbitration and bans all class-wide dispute resolution.[4] The CSA

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[3] The district court discussed extensively AT&T's litigation experience prior to the drafting of the CSA. The court noted that, in recent years, AT&T and its competitors had faced a number of costly class action lawsuits. *See Ting*, 182 F.Supp.2d at 918.

[4] Section 7, captioned "Dispute Resolution," sets forth procedures for resolving customer disputes. In approximately eight-point font (replicated below), section 7(a) provides in part:

> THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION. YOU CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF

also contains a secrecy provision for all arbitration proceedings and requires consumers to bring all claims within a two-year limitations period.

Before presenting the CSA to its customers, AT&T conducted extensive market research designed to predict how consumers would react to the CSA, which AT&T planned to mail with a cover letter and a set of frequently asked questions. AT&T's cover letter stated in bold text *"[P]lease be assured that your AT&T service or billing will not change under the AT&T Consumer Services Agreement; there's nothing you need to do."* AT&T's market study concluded that most customers "would stop reading and discard the letter" after reading this disclaimer. AT&T did not change the substance of the letter as a result of its market research—indeed, internal AT&T documents indicate that the letter was specifically intended to make customers less alert to the details of the CSA.

AT&T mailed the CSA in two separate mailings. To approximately 18 million of its residential, long-distance customers, AT&T included the materials in the envelope that contained the customer's monthly bill. No statement regarding the new agreement appeared on the outside of the envelope. To its remaining 42 million residential, long-distance customers, AT&T mailed the CSA and other

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FROM A FEDERAL OR STATE REGULATORY AGENCY. NO DISPUTE MAY BE JOINED WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OTHER PERSON, OR RESOLVED ON A CLASS WIDE BASIS. THE ARBITRATOR MAY NOT AWARD DAMAGES THAT ARE NOT EXPRESSLY AUTHORIZED BY THIS AGREEMENT AND MAY NOT AWARD PUNITIVE DAMAGES OR ATTORNEYS' FEES UNLESS SUCH DAMAGES ARE EXPRESSLY AUTHORIZED BY A STATUTE. YOU AND AT&T BOTH WAIVE ANY CLAIMS FOR AN AWARD OF DAMAGES THAT ARE EXCLUDED UNDER THIS AGREEMENT.

materials in a separate envelope marked, "ATTENTION: Important information concerning your AT&T service enclosed." According to AT&T's research, only 25 percent of its customers were likely to open the separate mailing, approximately 10 percent would not even look at it, and only 30 percent would actually read the entire contract.

Sometime in July 2001, plaintiff Ting received, opened, and read the mailing from AT&T. Like most of AT&T's customers, she was not aware of AT&T's obligation under mandatory detariffing to forge contracts with its residential customers and was not expecting a contract from AT&T. The CSA and letter advised customers that by continuing to use or to pay for AT&T's service, the customer was accepting the terms of the CSA through the so-called "negative option". The second paragraph of the CSA itself provided that, in the event a customer did not wish to be bound by the CSA, the customer could call a toll-free number and cancel his or her AT&T service. The cover letter advised customers that the CSA described AT&T's "new binding arbitration process, which used an objective third party rather than a jury for resolving any disputes that may arise." The letter never mentioned the word "contract," but instead spoke of "providing information" to customers. Finally, the CSA did not include a provision informing customers that federal law would govern its relationship with AT&T, but instead included an express New York state law choice-of-law provision.

Plaintiffs Ting and Consumer Action brought a state-court class action against AT&T for declaratory and injunctive relief, alleging that the Legal Remedies Provisions violate California's consumer protection and contract laws. AT&T argued that it had satisfied California's contract-formation requirements as required in the Second Report and Order, 11 F.C.C.R. 20,730, at ¶ 77, and that in any event, plaintiffs' substantive challenges to the lawfulness of the CSA were preempted by the Communications Act. After concluding that

the Legal Remedies Provisions violated California's public policy and unconscionability law, the district court concluded that neither § 201(b) nor § 202(a) of the 1934 Act preempted state law in the detariffed environment because Congress removed the filing requirement with the intention of ending the preemptive regime of the filed rate doctrine. *See Ting*, 182 F.Supp.2d at 927-38.

STANDARDS OF REVIEW

We review for abuse of discretion the district court's grant of a permanent injunction, but review any determination underlying the grant of an injunction by the standard that applies to that determination. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir.2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 2663, 153 L.Ed.2d 837 (2002). Accordingly, we review the district court's factual findings under the clearly erroneous standard. *Berkla v. Corel Corp.*, 290 F.3d 983, 990 (9th Cir.2002), *amended by* 302 F.3d 909 (9th Cir.2002). The district court's conclusion that the CSA was unconscionable raises a question of law subject to de novo review. *Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1412 (9th Cir.1996); *Arcwel Marine, Inc. v. Southwest Marine, Inc.*, 816 F.2d 468, 470 (9th Cir.1987). We review de novo the district court's preemption analysis. *AGG Enters. v. Wash. County*, 281 F.3d 1324, 1327 (9th Cir.2002).

DISCUSSION

I. Preemption

AT&T contends that §§ 201(b) and 202(a) of the Communications Act contain a principle against preferential and discriminatory rates, which preempts the application of state contract and consumer protection laws prohibiting the terms contained in the Legal Remedies Provisions. One circuit court recently agreed with this novel argument. In *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir.2002), the Seventh

Circuit held that, "read together," §§ 201(b) and 202(a) preempt state law challenges to the validity of AT&T's arbitration clause banning class-action lawsuits. *Id.* at 418. The court reasoned that permitting state law challenges to the CSA's arbitration provision would violate the Communication Act's principle of uniform rates and could threaten AT&T's ability to offer its customers the lowest possible price in violation of § 202(a)'s principle against "preferences" and "unreasonable discrimination." *Id.* at 419-20.

Because we do not believe that state contract and consumer protection laws obstruct Congress' "chosen means" for effectuating the purposes of §§ 201(b) and 202(a) in a detariffed environment, we respectfully disagree with the *Boomer* court's conclusion. Examining "the provisions of the whole law, and . . . its object and policy," *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)), we reject AT&T's argument as contrary to both the text and structure of the 1934 Act and the clear intent of Congress in enacting the 1996 Act.

A. Preemption Doctrine

Pursuant to the Supremacy Clause, U.S. CONST., ART. VI, cl. 2, federal law can preempt and displace state law through: (1) express preemption; (2) field preemption (sometimes referred to as complete preemption); and (3) conflict preemption. *See Pac. Gas & Elec. Co. v. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983); *Int'l Paper Co. v. Oueilette*, 479 U.S. 481, 491, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987). Express preemption exists where Congress enacts an explicit

statutory command that state law be displaced.[5] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). Absent explicit preemptive text, we may still infer preemption based on field or conflict preemption, both of which require us to imply Congress' intent from the statute's structure and purpose. *See Sprietsma v. Mercury Marine*, ___ U.S. ___, ___, 123 S.Ct. 518, 527, 154 L.Ed.2d 466, ___ (2002); *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990).

Field preemption exists "'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.'" *Petitioning Creditors v. Matsco, Inc. (In re Cybernetic Servs., Inc.)*, 252 F.3d 1039, 1045-46 (9th Cir.2001) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Even when Congress has not occupied the field, we may still infer preemption if there is an "actual conflict" between federal and state law. Conflict preemption is found where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995)).

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[5] For example, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

When considering preemption, no matter which type, "[t]he purpose of Congress is the ultimate touchstone." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). Where the statute does not speak directly to the issue, we look to "the goals and policies of the Act in determining whether it in fact preempts an action." *Ouellette*, 479 U.S. at 493, 107 S.Ct. 805. As explained in *Gade*, "[o]ur ultimate task in any preemption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." 505 U.S. at 98, 112 S.Ct. 2374; *Cal. v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 504, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990). Ordinarily, we also apply a presumption against preemption. However, "when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000), the presumption usually does not apply, *id.; Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir.2002). Thus, we do not apply the presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications.

Sections 201(b) and 202(a) do not contain preemptive text, so express preemption is not an issue here. Likewise, field preemption is not an issue because state law unquestionably plays a role in the regulation of long-distance contracts. *See Boomer*, 309 F.3d at 424 (rejecting AT&T's field preemption argument, overruling in part *Cahnmann*, 133 F.3d at 489-90, which previously held that the Communications Act completely preempted state law, and stating that "following detariffing there appears to be some role for state law"); *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir.1998) (holding that the Communications Act does not "manifest a clear Congressional intent to preempt state law actions prohibiting

deceptive business practices, false advertising, or common-law fraud"). Indeed, even AT&T concedes that state law now governs the formation of consumer long-distance contracts. *See Boomer,* 309 F.3d at 424 (citing 12 F.C.C.R. 15,014, at ¶ 77). Detariffing has created a much larger role for state law and this fact is sufficient to preclude a finding that Congress intended completely to occupy the field, following the 1996 Act. We therefore focus exclusively on AT&T's claim of implied conflict preemption.

B. Implied Conflict Preemption

AT&T contends that the district court's order requires AT&T to "prefer" California customers at the expense of its customers in the remaining 49 states. AT&T argues that, as a result, it has been exposed to liability from unhappy non-Californians, some of whom may charge AT&T with unlawfully and unreasonably preferring the "locality" of California in violation of 47 U.S.C. § 202(a). In other words, AT&T claims that it has been placed between the proverbial rock and a hard place, forced to prefer California law, and that state law must give if Congress' objectives in passing §§ 201(b) and 202(a) are to be realized. We disagree.

Section 201(b) of the Communications Act provides:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful.

47 U.S.C. § 201(b). Section 202(a) of the Communications Act provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to

> make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a). After examining the structure, history, and purpose of these provisions, as well as the statute as a whole, *Gade,* 505 U.S. at 98, 112 S.Ct. 2374; *Ouellette*, 479 U.S. at 493, 107 S.Ct. 805, we hold that neither the Consumer Legal Remedies Act ("CLRA") nor California's unconscionability law "stands as an obstacle to the accomplishment and execution" of the full purposes and objectives of Congress in enacting §§ 201(b) and 202(a) of the Communications Act.

Under the obstruction strand of conflict preemption, an aberrant or hostile state rule is preempted to the extent it actually interferes with the "methods by which the federal statute was designed to reach [its] goal." *Ouellette*, 479 U.S. at 494, 107 S.Ct. 805; *see Gade*, 505 U.S. at 103, 112 S.Ct. 2374; *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir.2002). In making this determination, we "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); *Time Warner Entm't Co., v. FCC*, 56 F.3d 151, 195 (D.C.Cir.1995) ("[W]hether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract.") (quoting *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C.Cir.1984)). Thus, obstruction preemption focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law's text, application, history, and interpretation.

In this case, AT&T claims that the purpose of §§ 201(b) and 202(a) is to ensure national uniformity of carrier rates, terms, and conditions, and that Congress' chosen method of

effectuating this purpose is through unilateral policing by the FCC. Following detariffing, we find both arguments unpersuasive. We first examine the purpose of §§ 201(b) and 202(a) and then discuss Congress' chosen method to effectuate the statutes' objectives in the detariffed environment.

Purpose

AT&T contends that, if California customers need not pay for the benefit of bringing class actions, then the imposition of California's CLRA and unconscionability law frustrates the Communication Act's principle of uniformity by affording Californians a discount off the national rate. Thus, AT&T interprets §§ 201(b) and 202(a) as forbidding carriers from offering its customers anything but precisely the same terms, rates, and conditions nationwide. Because California's public policy prohibits the Legal Remedies Provisions, AT&T concludes that customers from other states are being discriminated against, contrary to Congress' object in passing §§ 201(b) and 202(a). We disagree. AT&T's argument conflates Congress' purpose in enacting § 202(a) and Congress' separate purpose in passing § 203.[6]

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[6] Section 203(a) provides in relevant part:

> Every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges. Such schedules shall . . . be posted and kept open for public inspection . . . each such schedule shall give notice of its effective date . . . .

47 U.S.C. § 203(a). In relevant part, § 203(c) provides:

> [N]o carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such [tariff] schedule than the charges specified in the schedule then in effect.

47 U.S.C. § 203(c).

Sections 201(b) and 202(a) unquestionably evince a congressional intent that customers receive fair and reasonable rates from telecommunications carriers. *See* 47 U.S.C. § 202(a) (making it unlawful for a carrier to "make any unjust or unreasonable discrimination" for "like communication service," or "to make or give any undue or unreasonable preference of advantage"). However, nearly 70 years of case law plainly demonstrates that the principle of uniformity is not derived from § 202(a) alone, but from the mandate to publish rates *together with* the discrimination principles reflected in §§ 201(b) and 202(a). *See, e.g., Cent. Office*, 524 U.S. at 223, 118 S.Ct. 1956; *MCI*, 512 U.S. at 230, 114 S.Ct. 2223 (stating that the filing requirement "'render[s] rates definite and certain, and . . . prevent[s] discrimination and other abuses'") (quoting *Ariz. Grocery Co. v. Atchison, Topeka, & Santa Fe Ry.*, 284 U.S. 370, 384, 52 S.Ct. 183, 76 L.Ed. 348 (1932)); *Brown*, 277 F.3d at 1170 ("The filed-rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff.") (quoting *Cent. Office*, 524 U.S. at 230-31, 118 S.Ct. 1956 (Rehnquist, C.J., concurring)).

Moreover, save for *Boomer,* no court has ever referred to § 201 or § 202 in declaring a carrier's tariff immune from state-law challenge. That role had always been reserved for § 203 and the filed rate doctrine. *See Cent. Office*, 524 U.S. at 223, 118 S.Ct. 1956 ("[T]he filed rate doctrine . . . is necessary to 'prevent carriers from intentionally "misquoting" rates to shippers as a means of offering them rebates or discounts,' the very evil *the filing requirement* seeks to prevent.") (emphasis added) (quoting *Maislin,* 497 U.S. at 127, 110 S.Ct. 2759); *id.* at 222, 110 S.Ct. 2759 ("[E]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff."); *id.* ("The rights as defined by the tariff cannot be varied or

enlarged by either contract or tort of the carrier."); *ICOM Holding*, 238 F.3d at 222-23 (holding that filed-rate doctrine barred state-law breach of contract claims); *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 866 (9th Cir.1997) ("[T]he filed rate doctrine bars all claims—state and federal—that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed.").

Now that the FCC no longer enforces § 203's filing requirement, the old statutory scheme—which is the foundation of AT&T's argument—fails to support AT&T's argument. AT&T's argument that § 202(a) satisfies both its own anti-discrimination function as well as § 203's preemption function is untenable. Congress structured the 1934 Act in autonomous parts—each piece having its own purpose and serving a distinct function. Indeed, Supreme Court cases "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990); *see also Gade*, 505 U.S. at 100, 112 S.Ct. 2374 ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted); *Adams v. Apfel*, 149 F.3d 844, 846 (8th Cir.1998) (stating that all provisions of a statute must be construed together to give each an independent meaning). We thus reject AT&T's interpretation of § 202, which would "render[ ] superfluous" § 203 of the 1934 Act. Because §§ 201(b) and 202(a) survived detariffing, the substantive principles of reasonableness and nondiscrimination remain intact. But the same cannot be said of the principle of preemption, which was a product of the filed rate doctrine which, by definition, did not survive detariffing.[7]

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[7] *See* Notice of Proposed Rule Making, 11 F.C.C.R. 7,141, at ¶ 31 ("In addition, the absence of tariffs would eliminate possible invocation by carriers of the filed rate doctrine."); Second Report and Order, 11 F.C.C.R. 20,730, at ¶ 38 ("Moreover, we note that in the absence of

To establish that § 202(a) contains an independent statement of uniformity, AT&T relies on *Central Office*, 524 U.S. 214, 118 S.Ct. 1956, 141 L.Ed.2d 222, as well as several cases arising under the Interstate Commerce Act, on which the 1934 Act was modeled. *See, e.g., Davis v. Cornwell*, 264 U.S. 560, 44 S.Ct. 410, 68 L.Ed. 848 (1924); *W. Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 41 S.Ct. 584, 65 L.Ed. 1094 (1921); *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155, 32 S.Ct. 648, 56 L.Ed. 1033 (1912); *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). In all of these cases, however, the regulatory scheme at issue included some form of a federal tariff filing requirement, even though the requirement at times was voluntary. By contrast, the current environment is completely detariffed and highly competitive. AT&T's heavy reliance on *Central Office* is similarly misplaced. That case focuses narrowly on the issue of the preemptive scope of the filed-tariff doctrine. 524 U.S. at 216, 118 S.Ct. 1956 ("The issue before us is whether the federal filed-tariff requirements of the Communications Act preempt respondent's state-law claims."). It provides no support for AT&T's argument that after detariffing state contract and consumer protection laws restricting AT&T's ability to impose the terms of its CSA on its consumers are preempted.

Finally, courts have never interpreted § 202(a) as mandating strict uniformity. Even prior to detariffing, courts emphasized that the provision did not prohibit all preferences, but only those that were "unjust or unreasonable." *See* 47 U.S.C. § 202(a). Therefore, if the application of different state contract and consumer protection laws resulted in different treatment of customers, such differences between states violated § 202(a) only if they resulted in unjust and

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tariffs, consumers will be able to pursue remedies under state consumer protection and contract laws in a manner currently precluded by the 'filed-rate' doctrine.").

unreasonable discrimination or preferences. In *Panatronic USA v. AT&T Corp.*, 287 F.3d 840 (9th Cir.2002), for example, we recently addressed § 202(a)'s test for reasonableness within the tariffed framework.[8] We held that failing to assess universal connectivity charges on some customers while assessing it on others was not unreasonable discrimination in pricing under § 202(a), because "[a] difference in price is not unreasonable if there is a 'neutral, rational basis underlying[the disparity].'"[9] *Id.* at 844 (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C.Cir.1984)) (second brackets in the original); *see also MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 41 (D.C.Cir.1990).

Accordingly, even when courts interpreted § 202(a) in the tariffed framework, contractual differences between customers of different states violated § 202(a) only if those differences lack a neutral and rational basis. *See also MCI*, 917

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[8] The cases cited by AT&T also demonstrate the recurring theme that courts have never interpreted § 202(a) as a preemptive provision. Rather, *Panatronic* indicates that courts treat § 202(a) as a consumer protection provision that is designed to remedy unreasonable price disparities. Save for *Boomer,* no court has ever interpreted §§ 201(b) or 202(a) independently to preempt state law. *See, e.g., Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89, 98-99 (2d Cir.2002); *Eagleview Tech. v. MDS Assocs.*, 190 F.3d 1195, 1197 (11th Cir.1999); *Am. Message Ctr. v. FCC*, 50 F.3d 35, 40 (D.C.Cir.1995); *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C.Cir.1993); *Reservation Tel. Coop. v. FCC*, 826 F.2d 1129, 1136 (D.C.Cir.1987); *Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C.Cir.1982).

[9] Courts have fashioned a three-step analysis to determine whether a carrier has violated § 202(a). First, we ask whether the services are "like." If they are, we ask whether there is a price difference between them, and if so, whether the difference is reasonable. *Nat'l Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 127 (2d Cir.2001); *Am. Message Ctr.*, 50 F.3d at 40. Plaintiff must establish the first two elements. The burden shifts to the carrier to justify the price disparity as reasonable. *Nat'l Communications Ass'n*, 238 F.3d at 129-133.

F.2d at 41 ("In order to adjudge whether price discrimination is reasonable under Section 202(a), the FCC must compare the charges actually assessed under the two pricing schemes and the 'terms' of each arrangement. It may declare the disparate charges lawful only if there is a neutral, rational basis underlying [the disparity].") (internal quotations omitted). This interpretation, adopted in the Ninth and D.C. Circuits, directly contradicts AT&T's interpretation that § 202(a), whether applied within or without the tariffed framework, precludes variations in carrier terms, rates, and conditions.

These arguments notwithstanding, the court in *Boomer* reasoned that the principle of strict uniformity survived detariffing because, in authorizing the FCC to forgo the tariff filing requirement, Congress directed the FCC to establish first that the filing of tariffs was "not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory." 309 F.3d at 421 (citing 47 U.S.C. § 160(a)(1)). The court reasoned that even though the FCC no longer mandates the filing of tariffs, "the congressional objective of providing uniform rates, terms and conditions remains, as does the federal prohibition on terms and conditions which are unjust or unreasonable." *Id.* at 421-22. Likewise, AT&T claims that the text of §§ 201(b) and 202(a), and particularly § 202(a)'s language regarding unreasonable "preference," provide enough textual support independently to preempt state law. *See* 47 U.S.C. § 202(a). A finding of obstruction, however, depends on more than a mere identification of favorable text. Indeed, we recognize that § 202(a) evinces a congressional intent that customers receive non-preferential treatment. But, in order to determine whether Congress' goals are truly being frustrated, the obstruction inquiry examines congressional purpose, as well as the method chosen by Congress to effectuate that purpose.

See Ouellette, 479 U.S. at 494, 107 S.Ct. 805; *Gade*, 505 U.S. at 103, 112 S.Ct. 2374. It is this second element that Congress altered in the 1996 Act.

C. Method

Prior to detariffing, "rate filing was Congress' chosen means of preventing unreasonableness in discrimination in charges." *MCI*, 512 U.S. at 230, 114 S.Ct. 2223. Following detariffing, AT&T argues that rate filing was only a "procedural mechanism" for achieving §§ 201(b) and 202(a)'s substantive goals, and therefore the removal of that mechanism did not modify the Communication Act's preemptive regime. We disagree for two reasons. First, although a procedural device, the filing requirement constituted the "heart of the common-carrier section of the Communications Act." *MCI*, 512 U.S. at 229, 114 S.Ct. 2223. We thus reject AT&T's casual assertion that the regulatory scheme has been only slightly affected by detariffing. To the contrary, it has been substantially altered. Second, although AT&T concludes correctly that Congress now believes that the goals of §§ 201 and 202 can be met without the filing mechanism, AT&T fails to recognize that Congress' fundamental purpose in enacting the 1996 Act was to replace the old monopoly-based regime with one based on market competition. Thus, when Congress authorized the FCC to eliminate the filing requirement, it chose to replace the rate filing mechanism with a market-based mechanism. Unlike rate filing, this market-based method depends in part on state law for the protection of consumers in the deregulated and competitive marketplace. This dependence creates a complimentary role between federal and state law under the 1996 Act.

Relying on *Western Union Telegraph*, AT&T contends that tariff filings were merely "procedural features" of the 1934 Act and that the preemptive effect of the Act truly "flowed" from § 202(a). 256 U.S. at 573, 41 S.Ct. 584. Much as congressional intent is the "touchstone" of preemption analysis,

however, "[t]he requirements of § 203 that common carriers file their rates with the Commission and charge only the filed rate were the centerpiece of the Act's regulatory scheme." *MCI,* 512 U.S. at 220, 114 S.Ct. 2223; *see also Fax Telecommunicaciones*, 138 F.3d at 488 ("The filed rate doctrine . . . is the central principle of the regulatory scheme for interstate telecommunications carriers."). When presented with the prospect of detariffing, and its potential effect on the structure and purpose of the 1934 Act, the Supreme Court commented that

> [l]oss of an entire toenail is insignificant; loss of an entire arm tragic. The tariff-filing requirement is, to pursue this analogy, the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model, this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness in discrimination in charges . . . . The duty to file rates with the Commission, . . . and the obligation to charge only those rates, have always been considered essential to preventing price discrimination and stabilizing rates.

MCI, 512 U.S. at 229-30, 114 S.Ct. 2223 (quoting in part *Maislin*, 497 U.S. at 126, 110 S.Ct. 2759). The Court went on to explain that "[m]uch of the rest of the Communications Act subchapter applicable to Common Carriers . . . are premised upon the tariff-filing requirement of § 203," including § 201 and § 202. *Id.* at 230, 114 S.Ct. 2223. Critically, the Court opined that if the filing requirement were removed, "[t]he provisions allowing customers and competitors to challenge rates as unreasonable or as discriminatory, would not be susceptible of effective enforcement," because "rate filings

are, in fact, the essential characteristics of a rate-regulated industry."[10] *Id.* at 230-31, 114 S.Ct. 2223 (citing 47 U.S.C. §§ 204, 206, 207, 406).

Thus, in authorizing the FCC to forbear from enforcing the tariff filing requirement, Congress not only removed its "chosen means" of enforcing §§ 201 and 202, it removed the "heart" of the 1934 Act. Pursuant to the Court's interpretation of the regulatory scheme in *MCI,* unless Congress replaced the filing requirement with an alternative means of enforcement, the regulatory scheme is not "susceptible of effective enforcement" following detariffing. 512 U.S. at 230-31, 114 S.Ct. 2223. Both AT&T and the court in *Boomer* fail to recognize that §§ 201 and 202 contain substantive standards that are enforceable only if they have an enforcement vehicle, such as the filing requirement. Prior to detariffing, the filing requirement forbade carriers from "demand[ing] . . . a greater or less or different compensation . . . than the charges specified in the schedule then in effect." 47 U.S.C. § 203(c). Under this scheme, a carrier was prohibited from varying its published contract terms. *See Cent. Office*, 524 U.S. at 223, 118 S.Ct. 1956; *Brown*, 277 F.3d at 1170 ("A carrier is forbidden from charging rates other than as set out in its filed tariff."). Congress' new market-based method contains no such restriction. The market not only encourages carriers to remain flexible, it protects consumers through state contract and consumer protection laws, and ensures reasonable rates through competition rather than rate filing. On balance, the market-based approach calls for §§ 201 and 202 to be interpreted in light of market conditions.

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[10] In a footnote, the court explained that while eliminating the tariff filing requirement would frustrate the FCC's ability to enforce the Act through the complaint process, it would not compromise Congress' underlying purpose in passing the 1934 Act. *MCI*, 512 U.S. at 231 n. 4, 114 S.Ct. 2223.

Moreover, AT&T's argument that Congress intended to maintain the status quo after the 1996 Act must fail. The preemptive effect of the filed rate doctrine, as its name plainly implies, rested entirely on the filing requirement. There is nothing in the 1996 Act to suggest that Congress replaced the filing requirement with another preemptive provision. While the principle of reasonableness insured that all filed rates were fair before they actually preempted state law, AT&T's argument that the reasonableness requirement independently preempts state law is unpersuasive, given both the primacy of the filing requirement in preempting state law under the old regime and the complete absence of any support for the proposition that § 202(a) independently preempts state law absent the filing requirement. The FCC, moreover, recognized the void left by the abandonment of the filed rate doctrine when it stated expressly that "in the absence of . . . tariffs . . . consumers will not only have our complaint process, but will also be able to pursue remedies under state consumer protection and contract laws." Second Report and Order, 11 F.C.C.R. 20,730, at ¶ 42; *see also id.* at ¶ 5.

Under the old regime, state law interfered with Congress' chosen method of rate filing in that, pursuant to the filed rate doctrine, the tariff could not be "varied or enlarged by either contract or tort of the carrier." *Cent. Office*, 524 U.S. at 227, 118 S.Ct. 1956 (quoting *Keogh,* 260 U.S. at 163, 43 S.Ct. 47); *MCI,* 512 U.S. at 230, 114 S.Ct. 2223. Federal law therefore preempted state law. But under the competition-based regime adopted by Congress in 1996, and implemented by the FCC, state law protections are no longer excluded as they once were under the express terms of the filed rate doctrine. In the post-tariff environment, we find no reason to imply a conflict between otherwise complimentary state and federal laws. In deregulated markets, compliance with state law is the norm rather than the exception. Congress recognized as much in authorizing forbearance authority and in emphasizing competition in the 1996 Act.

Congress envisioned the 1996 Act as a dramatic break with the past that would revolutionize long distance service by greatly decreasing the scope of the FCC's role. The Senate floor manager, Senator Larry Pressler, stated that "[t]his is the most comprehensive deregulation of the telecommunications industry in history." CONG. REC. S8188-04, S8197 (daily ed. June 12, 1995).[11] To this end, the purpose of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. (100 Stat. 5) 124; *see City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1170 n. 5 (9th Cir.2001). Section 160(a) of the 1996 Act also provides that "[i]f the Commission determines that . . . forbearance will promote competition . . . that determination may be the basis for a . . . finding that forbearance is in the public interest." 47 U.S.C. § 160(b); *see also Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 1668 n. 20, 152 L.Ed.2d 701 (2002) ("[T]he Act was 'deregulatory,' in the intended sense of departing from traditional 'regulatory' ways that coddled monopolies[.]").

Congress was well aware of the FCC's long struggle to detariff and its rationale for wanting to do so when it passed the 1996 Act. Throughout this struggle, the FCC continually

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[11] *See also* Sen. Pressler, 141 CONG. REC. S7942-04, S7967 (daily ed. June 8, 1995) ("This bill is much more deregulatory than any we have had before us . . . . [I]t will be a great step toward deregulation and a pro-market competition."); Rep. Oxley, 141 CONG. REC. H8281-02, H2826 (daily ed. Aug. 2, 1995) ("Make no mistake about it. This is the most deregulatory bill in American history. . . . It opens up all telecommunications markets to full competition . . . ."); Sen. Gorton, 141 CONG. REC. S8206-02, S8212 (daily ed. June 13, 1995) (stating that the Act would allow "States to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, which are, of course, the precise goals of this Federal statute itself").

stressed that filing was unnecessary because increased competition in the long-distance marketplace, rather than rate-filing, could guarantee reasonable and fair treatment of customers. In its Notice of Proposed Rule Making, the FCC summarized its long-held position: "The economic underpinning of our proposal to streamline the regulatory procedures for non-dominant carriers flows from the fact that firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, contravene Sections 201(b) and 202(a) of the Act." 11 F.C.C.R. 7,141, at ¶ 28. As early as 1980, the FCC had proposed a system in which §§ 201 and 202 would be enforced not through rate filings but market-based competition. *See* First Report and Order, 85 F.C.C.2d 1, at ¶ 16 (1980) ("[T]hese carriers generally lack the market power to charge rates or impose conditions of service that would contravene the Act.").[12] The FCC emphasized this rationale for the next 15 years. In 1996, Congress finally amended the Communications Act to grant the FCC the authority needed to detariff.

The FCC's detariffing orders provide further confirmation that Congress intended to replace the filing mechanism with a market-based mechanism that expressly encompassed state law. In numerous passages, the FCC makes clear that the availability of state law remedies in the newly-detariffed telecommunications marketplace is an essential part of protection for consumers. Responding to an argument that consumers would not be adequately protected in a detariffed environment, the FCC stated that consumers will "not only have our complaint process, but will also be able to pursue remedies under state consumer protection and contract laws." Order on Reconsideration, 12 F.C.C.R. 15,014, at ¶ 42. The FCC

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[12] *See also* Sixth Report and Order, 99 F.C.C.2d 1020, at ¶ 12 ("We have previously stated that non-dominant carriers have insufficient market power to engage in activities that Congress sought to prevent.").

added: "[W]hen interstate . . . services are completely detariffed, consumers will be able to take advantage of remedies provided by *state consumer protection laws and contract law against abusive practices.*" Second Report and Order, 11 F.C.C.R. 20,730, at ¶ 5 (emphasis added). The Commission concluded that "a regime without nondominant interexchange carrier tariffs for interstate, domestic, interexchange service is the *most pro-competitive, deregulatory system.*" *Id.* at ¶ 52 (emphasis added). It added that "parties that oppose complete detariffing have not shown that the business of providing interstate, domestic, interexchange services offered by nondominant interexchange carriers should be subject to a regulatory regime that is not available to firms that compete in any other market in this country." *Id.* at ¶ 138.

AT&T emphasizes the FCC's response to AT&T's petition for clarification, in which the FCC stated that it would continue to govern the reasonableness of carrier-customer contracts in the detariffed environment. *See* 12 F.C.C.R. 15,014, at ¶ 77 (1997). Contrary to AT&T's assertions, the FCC's clarification is entirely consistent with Congress' chosen method of enforcing § 201 and § 202's substantive standards. As noted above, the obstruction inquiry examines the "relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones,* 430 U.S. at 526, 97 S.Ct. 1305. The FCC recently applied § 202(a) in the detariffed environment, and adopted the market-based mechanism for enforcing the fairness standard. *See Orloff v. Vodafone Airtouch Licenses*, 17 F.C.C.R. 8987 (2002). The case demonstrates that while the FCC continues to "govern" § 201 and § 202, state law is no longer excluded as it was under the filed rate doctrine, because Congress's market-based mechanism permits—indeed, depends upon—the imposition of state law. It is just that under detariffing, § 201 and § 202 are now interpreted in light of a market environment.

In *Orloff*, the FCC held that a telecommunications carrier may grant preferences to customers consistent with § 202(a), provided the relevant market is competitive enough that no single provider dominates the market. The FCC applied the same three-part test as in *Panatronic*, and held that Vodafone's practice of meeting competitors' inducements (but not making them available for existing customers) did not amount to unreasonable or unjust discrimination in violation of § 202(a) of the 1934 Act because market forces protect the customer in the detariffed environment. *Id.* at 8996-97. The FCC concluded that:

> Given the indisputable competition in the Cleveland CMRS market, we decline to find that Defendants' concessions practices violated section 202(a) of the Act, even if those practices allowed some consumers to negotiate better deals than other consumers. This is because we find that market forces protect Cleveland consumers from discrimination from these particular practices. We find that there is no evidence that any market failure prevented customers from switching carriers if they were dissatisfied.

Id. Thus, in contrast to 1934, when Congress enacted §§ 201(b) and 202(a) to protect customers for whom AT&T was the only option, the FCC now defers to the market unless the market is seriously flawed or not competitive. In so doing, the FCC has imported the rationale behind detariffing (namely, that competition can guarantee reasonable rates) into the law of § 202(a). *See* Second Report and Order, 11 F.C.C.R. 20,730, at ¶ 21 ("[W]e believe that market forces will generally ensure that the rates, practices, and classifications of nondominant interexchange carriers for interstate, domestic, interexchange services are just and reasonable and not unjustly or unreasonably discriminatory.").

Of course, in the case of interstate services and the application of state law, a customer cannot avoid the "preference"

afforded California customers. Therefore, an unsatisfied customer cannot "switch" from AT&T to another provider to seek redress. The dispositive question, however, is not whether the customer can go elsewhere, but whether the market in question is competitive enough to dissuade carriers from discriminating or overcharging. In assessing any particular market, moreover, the imposition of state law is not generally considered an "imperfection" or "failure," and we decline to characterize it as one here. By definition, the deregulated marketplace encompasses state laws of general applicability. Here, California's unconscionability law is not unlike that of most other states, and even if it were, it does not make an otherwise competitive market non-competitive. The same can be said of the CLRA. State contract and consumer protection laws, including California's CLRA and unconscionability law, form part of the competitive framework to which the FCC defers.

The FCC's hands-off approach conforms to the FCC's rationale for detariffing and to Congress' rationale for granting the FCC authorization to forbear from detariffing. During the course of implementing the 1996 Act, the FCC stated on a number of occasions that one of the major purposes of detariffing was to eliminate the filed rate doctrine and its harmful effects on customers. *See* Second Report and Order, 11 F.C.C.R. 20,730, at ¶ 55; Order on Reconsideration, 12 F.C.C.R. 15,014, at ¶¶ 12, 13, 80; Second Order on Reconsideration, 14 F.C.C.R. 6004, at ¶ 17 (1999). Prior to detariffing, the federal tariff structure provided the framework for the carrier-customer relationship. *See MCI*, 512 U.S. at 229-30, 114 S.Ct. 2223. After detariffing, federal telecommunications regulation is silent with respect to how to determine the rights and obligations of parties to individual contracts like the CSA.

Although the FCC understood how to apply and interpret tariffs, this expertise has little application in the review and interpretation of each carrier's "short, standard contract[ ]."

11 F.C.C.R. 20,730, at ¶ 57. More to the point, there is no federal common law of contracts that the FCC can apply in resolving private contract disputes between long distance carriers and their customers. In *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), the Court noted that federal common law is "limited to situations where there is a significant conflict between some federal policy or interest and the use of state law." *Id.* at 87, 114 S.Ct. 2048 (internal quotations omitted) (stating that federal common law displaces state law only in "few and restricted" areas). With the advent of detariffing, the conflict between state and federal law no longer exists and thus application of federal common law is inappropriate. *See also Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981) (stating that courts must be cautious in fashioning federal common law because "the federal lawmaking power is vested in the legislative, not the judicial, branch of government"). AT&T fails to address this critical point. In the absence of significant conflict between federal policy and the use of state law, we hold that state contract and consumer protection laws form part of the framework for determining the rights, obligations, and remedies of the parties to the CSA.

In both *Panatronic* and *Orloff*, the court and Commission interpreted and applied § 202(a) to permit the "execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, 61 S.Ct. 399, while at the same time leaving ample room for state law. In *Panatronic*, we interpreted § 202's reasonableness requirement as permitting neutral and rational differences, 287 F.3d at 844, whereas in *Orloff*, the FCC applied § 202(a) to permit preferential treatment so long as the market was competitive, 17 F.C.C.R. at 8996-97. Notwithstanding AT&T's pre-detariffing interpretation of the 1934 Act, neither *Panatronic* nor *Orloff* applies § 202 in a manner that excludes state law or obstructs Congress' objectives in passing the 1996 Act. In short, whereas Congress

previously required tariffs to ensure strict uniformity with §§ 201 and 202's standards, Congress now relies on competition to ensure a more market-oriented (and less collusive) level of compliance with §§ 201 and 202. We therefore conclude that neither the CLRA nor California's unconscionability law conflicts with § 201(b) or § 202(a), because neither law interferes with Congress' chosen method in effectuating the purposes of the federal law.

D. Factual Findings

Finally, we emphasize that this case comes to us after trial, with extensive factual findings by the district court. The district court found that although AT&T suggested that its costs would be lower if it could impose the Legal Remedies Provisions on its customers, AT&T actually presented no evidence that the Legal Remedies Provisions would, in fact, produce lower charges. *Ting*, 182 F.Supp.2d at 931 n. 16. The court also refused to assume that lower costs necessarily result in lower charges, "since while lower costs can produce lower charges, they can also produce higher profits." *Id.* We review these findings under the clearly erroneous standard. *Berkla*, 290 F.3d at 990.

AT&T asks us to assume that long-distance telecommunications carriers automatically pass on savings from litigation costs to its customers rather than maintaining them as higher profits. Yet AT&T presents no evidence that class-action lawsuits actually increase AT&T's litigation costs, and if so, by just how much. Furthermore, the FCC has concluded that "requiring nondominant interexchange carriers to conduct their businesses as do other businesses in an unregulated market will not substantially increase their costs." Order on Reconsideration, 12 F.C.C.R. 15,014, at ¶ 15. In *Boomer,* the Seventh Circuit considered the same question absent a factual record, and held, in the abstract, that a state law challenge to "an arbitration clause (or for that matter a provision prohibiting class actions) not only affects

uniformity of that term, but it also threatens to destroy the consistency of rates offered consumers throughout the United States." 309 F.3d at 419. Because the case at bench contains specific findings of fact, finding that the CSA's arbitration provisions did not in fact affect AT&T's costs, we need not reach the abstract question of whether an arbitration provision banning class actions per se lowers costs. Applying clear error review, we affirm the district court's finding that the Legal Remedies Provisions do not constitute an "unreasonable discrimination in charge" affecting AT&T's rates, terms, or conditions. For this reason, even assuming *arguendo* that §§ 201(b) and 202(a) have preemptive effect, AT&T fails to establish that the Legal Remedies Provisions fall within § 202(a)'s alleged preemptive scope.

II. California Law

We next consider AT&T's claim that even if federal law does not preempt Ting's state law challenges, California law does not render the Legal Remedies Provisions unenforceable. The district court enjoined sections 4 and 7 of the CSA on two grounds. First, the district court held that the CSA's two-year limitations period for bringing claims, as well as the bar on class actions, were unenforceable under the anti-waiver provisions of the CLRA. Next, the district court concluded that four aspects of sections 4 and 7 of the CSA were procedurally and substantively unconscionable.

A. Consumer Legal Remedies Act

Section 1751 of the CLRA renders "unenforceable and void" any waiver by a consumer of the statutory rights provided for under the CLRA, *Am. Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 707 (2001), and sections 1781(a) and 1783 permit consumers to bring class actions within a three-year limitations period. Cal. Civ.Code §§ 1751, 1781(a), 1783. Because the CSA bars class-action lawsuits and imposes a two-year limitations

period, the CSA violates the express terms of the CLRA. In response, AT&T contends that the Federal Arbitration Act ("FAA") preempts the application of the CLRA. The district court did not reach this issue, but, on this issue of law, we agree with AT&T.

The FAA makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract.*" 9 U.S.C. § 2 (emphasis added). With the enactment of the FAA, "Congress precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). Under § 2, however, state law is not entirely displaced from federal arbitration analysis. In *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir.2001), we stated that "as long as state law defenses concerning the validity, revocability, and enforceability of contracts are *generally applied* to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA." *Id.* at 937 (emphasis added); *see also Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) ("[S]tate law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.") (emphasis in the original).

The CLRA applies to any contract "undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Cal. Civ.Code § 1770(a). Section 1761(d) defines "consumer" to mean "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." Cal. Civ.Code § 1761(d). Accordingly, the CLRA does not apply to commercial or government

contracts, or to contracts formed by nonprofit organizations and other non-commercial groups. *See Cal. Grocers Ass'n v. Bank of Am.*, 22 Cal.App.4th 205, 27 Cal.Rptr.2d 396, 404 (1994) (holding that trade group is not "consumer" of services for personal, family, or household purposes as defined within CLRA). The CLRA is also inapplicable to rental agreements. *Lazar v. Hertz Corp.*, 143 Cal.App.3d 128, 191 Cal.Rptr. 849, 858 (1983) (stating that customer who rented automobile is not "consumer" covered by CLRA).

Because the CLRA applies to such a limited set of transactions, we conclude that it is not a law of "general applicability." *Cf. Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (preempting anti-waiver provision that rendered "void" the waiver of "any provision of [California Franchise Investment Law]"); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir.2001) (preempting California law that "applies only to forum selection clauses and only to franchise agreements"). Similar to the limited nature of the statute in *Bradley,* the CLRA applies only to noncommercial contracts and only to consumer contracts. For this reason, we reverse the district court's holding that section 1751 of the CLRA renders void the CSA's class action ban and two-year limitations period.

B. Unconscionability

In California, a contract or clause is unenforceable if it is both procedurally and substantively unconscionable. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000); *Circuit City v. Adams*, 279 F.3d 889, 893 (9th Cir.2002) (citing *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138, 145 (1997)). Pursuant to *Armendariz*, courts apply a sliding scale: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is

unenforceable, and vice versa." 99 Cal.Rptr.2d 745, 6 P.3d at 690; *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir.2001).

1. Procedural Unconscionability

A contract is procedurally unconscionable if it is a contract of adhesion, *i.e.,* a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it. *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 690 (citing *Neal v. State Farm Ins. Co.*, 188 Cal.App.2d 690, 10 Cal.Rptr. 781 (1961)); *see also Circuit City*, 279 F.3d at 893; *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 113 Cal.Rptr.2d 376, 382 (2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability."). In finding the CSA procedurally unconscionable, the district court emphasized that, after drafting the agreement, AT&T imposed the CSA on its customers without opportunity for negotiation, modification, or waiver. We agree. AT&T mailed the CSA in an envelope that few customers realized contained a contract, and offered its terms on a take-it-or-leave-it basis. *Cf. Flores*, 93 Cal.App.4th at 853-54 (holding that generic arbitration clauses contained in loan agreement and deed of trust constituted a contract of adhesion because offered without opportunity for negotiation).

AT&T responds that the district court ignored the fact that the third largest carrier, Verizon, had no arbitration agreement in their contract and that consumers therefore had the option of rejecting AT&T's CSA and switching to a competitor. Even if this is the case, and even assuming such alternatives matter under California law, *see Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 691 (rejecting contention that availability of alternative sources of supply affects the procedural unconscionability analysis), it nonetheless fails to overcome the district court's well-founded conclusion that the CSA is a

procedurally unconscionable contract. *See Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862, 867 (2002) ("Szetela received the amendment to the Cardholder Agreement in a bill stuffer . . . . His only option, if he did not wish to accept the amendment, was to close his account. [This] establishes the necessary element of procedural unconscionability."). Indeed, if customers complained about the arbitration provision, AT&T responded with a letter informing them that "all other major long distance carriers have included an arbitration provision in their services agreement." Consequently, if consumers had meaningful choices, AT&T intentionally dissuaded its own customers from seeking them. *See Flores*, 93 Cal.App.4th at 853 (finding procedural unconscionability in part because "HomeFirst's representative told plaintiffs that HomeFirst was the only company in California offering reverse mortgages, thereby indicating that plaintiffs had no real choice of alternate lenders").

2. Substantive Unconscionability

Substantive unconscionability focuses on the one-sidedness of the contract terms. *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 690; *Flores*, 93 Cal.App.4th at 854. Where an arbitration agreement is concerned, the agreement is unconscionable unless the arbitration remedy contains a "modicum of bilaterality." *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 692. "Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Id.* In determining whether an arbitration agreement is sufficiently bilateral, courts assessing California law look beyond facial neutrality and examine

the actual effects of the challenged provision. *See Acorn v. Household Int'l, Inc.*, 211 F.Supp.2d 1160, 1172 (N.D. Cal.2002); *Szetela*, 118 Cal.Rptr.2d at 868.

The district court declared unconscionable four aspects of the CSA: (1) the bar on class actions, (2) the arbitration fee scheme, (3) the secrecy provision, and (4) the limitation on willful misconduct.[13]

a. Class Action Provision

In *Szetela*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862, the California Court of Appeal recently considered the conscionability of a class action ban in a contract of adhesion. *Id.* at 867. The court stated that "[a]lthough styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact [defendant] Discover [Card], because credit card companies typically do not sue their customers in class-action lawsuits." *Id.* Given the actual effects of the provision, the court found the class action ban "manifest[ly] one-sided[ ]" and therefore substantively unconscionable. *Id.*

The district court below adopted similar reasoning, as have most other courts to consider the issue. *See Luna v. Household Fin. Corp. III*, 2002 WL 31487425, *9 (W.D.Wash. Nov.4, 2002); *Acorn*, 211 F.Supp.2d at 1172; *Mandel v. Household Bank*, 105 Cal.App.4th 75, 129 Cal.Rptr.2d 380,

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[13] AT&T subsequently amended the CSA to eliminate the language limiting its liability for willful misconduct. AT&T also re-wrote the confidentiality provision. On appeal, AT&T challenges the district court's judgment enjoining the provisions on the sole ground that the court erred in not rewriting the provisions. Yet the district court reasonably concluded that because the Legal Remedies Provisions were so "permeated with unconscionability and illegality," they could not as a whole be saved or reformed. The court did not abuse its discretion in so concluding.

2003 WL 57282, at *4 (2003) (applying Nevada law); *Mercuro v. Superior Court*, 96 Cal.App.4th 167, 116 Cal.Rptr.2d 671, 678 (2002) (arbitration forum, though equally applicable to both parties, relevant to finding of unconscionability because "repeat player effect" rendered provision disadvantageous to weaker party).[14] It is not only difficult to imagine AT&T bringing a class action against its own customers, but AT&T fails to allege that it has ever or would ever do so. Instead, it raises a number of alternative challenges to the district court's holding. However, because "bilaterality" is a requirement in all California arbitration agreements, *see Armendariz*, 6 P.3d at 692; *Circuit City*, 279 F.3d at 893, we affirm the district court's conclusion that the class-action ban violates California's unconscionability law.[15]

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[14] To the extent *Arriaga v. Cross Country Bank*, 163 F.Supp.2d 1189 (S.D.Cal.2001), is inconsistent with the conclusion reached in *Szetela*, *Acorn*, and *Mercuro*, we reject it as inconsistent with *Armendariz*. *Arriaga* held that a class action ban was not "one-sided" because, unlike in *Armendariz*, neither side technically had recourse to the courts. *Id.* at 1195. This conclusion ignores the obvious practical implications of the arbitration provision. As noted in *Szetela*, there is no chance that any large company like AT&T would file a class action against its consumers. 118 Cal.Rptr.2d at 867-68. That the company *may* do so is not dispositive. To hold otherwise ignores the question that underlies the substantive unconscionability analysis, namely, whether the agreement is unduly one-sided. *See Circuit City*, 279 F.3d at 893.

[15] We disagree with the California Court of Appeal's recent analysis in *Discover Bank v. Superior Court*, 105 Cal.App.4th 326, 129 Cal.Rptr.2d 393, 2003 WL 116143 (2003). Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA. *See Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. 1652. We recognize, as does the court in *Discover Bank*, that the FAA preempts state laws of limited applicability, including the CLRA, but we follow well-settled Supreme Court precedent in rejecting the proposition that unconscionability is one of those laws. *See id.* at 686-87 (stating that the Act "declares that state law may be applied if that law arose to govern issues concerning validity, revocability, and enforceability of contracts generally," and holding that "generally

b. Fee-Splitting Scheme

The CSA requires customers to split the arbitrator's fees with AT&T. In enjoining the provision as unconscionable, the district found that while the majority of complainants would be handled satisfactorily either by customer service representatives or subsidized arbitration, some complainants would hypothetically face prohibitive arbitration costs, effectively deterring them from vindicating their statutory rights.

In *Circuit City*, 279 F.3d 889, we recently applied California law in declaring a similar fee-splitting scheme unenforceable. *Id.* at 894. That case is indistinguishable from the one at bench. Here, the scheme is unconscionable because it imposes on some consumers costs greater than those a complainant would bear if he or she would file the same complaint in court. *See Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 687 ("[T]he arbitration process cannot generally require the employee to bear any *type* of expenses that the employee would not be required to bear if he or she were free to bring the action in court.") (emphasis in original). A number of other courts have arrived at the same conclusion. *See Shankle v. B-G Maint., Inc.*, 163 F.3d 1230, 1235 (10th Cir.1999) (holding unenforceable a fee-splitting provision that would cost an employee between $1,875 and $5,000 to resolve a particular claim); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C.Cir.1997) (upholding a fee-splitting agreement, but only after the court construed the agreement to require the employer to pay all the arbitrator's fees). Consistent with our decision in *Circuit City*, we affirm the district court's conclusion that the CSA's fee splitting scheme is unconscionable.

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applicable contract defenses, such as fraud, duress or *unconscionability*, may be applied to invalidate arbitration agreements without contravening" the FAA) (emphasis added).

Our decision is also consistent with the FAA. AT&T contends that the district court "singled out" arbitration agreements for special treatment by declaring the provision unconscionable simply because it would require customers to share some of the costs. However, parties that agree to arbitrate statutory claims still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights. *Circuit City*, 279 F.3d at 895 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)); *Cole*, 105 F.3d at 1482. Among these protections is the assurance that an individual need not "pay either unreasonable costs or any arbitrators' fees *or* expenses as a condition of access to the arbitration forum." *Cole*, 105 F.3d at 1482 (emphasis in the original) (listing five basic requirements that arbitration forum must meet). Additionally, because unconscionability is a defense to contracts generally and does not single out arbitration agreements for special scrutiny, it may be raised consistent with § 2 of the FAA. *Doctor's Assocs.*, 517 U.S. at 688, 116 S.Ct. 1652.

c. Confidentiality Provision

The CSA's confidentiality provision requires "[a]ny arbitration [to] remain confidential."[16] Although facially neutral, confidentiality provisions usually favor companies over individuals. In *Cole*, 105 F.3d 1465, the D.C. Circuit recognized that because companies continually arbitrate the same claims, the arbitration process tends to favor the company. *Id.* at 1476. Yet because of plaintiffs' lawyers and arbitration appointing agencies like the AAA, who can scrutinize

[16] AT&T subsequently re-wrote the confidentiality provision. Initially, the confidentiality provision stated: "Any arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award."

arbitration awards and accumulate a body of knowledge on a particular company, the court discounted the likelihood of any harm occurring from the "repeat player" effect. *Id.* at 1486. We conclude, however, that if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player. This is particularly harmful here, because the contract at issue affects seven million Californians. Thus, AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T. For these reasons, we hold that the district court did not err in finding the secrecy provision unconscionable.

C. FAA Arbitration Preemption

AT&T argues that the district court applied California's unconscionability law in a manner "inherently hostile" to arbitration. *See Perry,* 482 U.S. at 492 n. 9, 107 S.Ct. 2520; *cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (rejecting legal analysis that "rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law"). We disagree.

If the district court indicated any hostility, it was not directed at arbitration, but at the manner in which it was forced upon consumers, the way in which AT&T avoided liability for willful misconduct, and the costs to consumers of vindicating their rights. The decision is hostile to the adhesive and oppressive nature of the CSA, not to the particular forum. *See, e.g., Circuit City*, 279 F.3d at 891-92 (holding unconscionable similar arbitration agreement that required

employees to submit all claims and disputes to binding arbitration). More importantly, the Supreme Court's generalized statements on arbitration do not override the FAA's particular rule, which obtains here and which is well-settled: "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *See Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. 1652.

CONCLUSION

In sum, we affirm the district court's conclusion that the Legal Remedies Provisions are unenforceable as unconscionable under California law, the application of which is not preempted by §§ 201(b) and 202(a) of the Federal Communications Act. The FAA preempts the CLRA's anti-waiver provision. We therefore reverse the district court's conclusion that the CLRA renders void the CSA's class action ban and two-year limitations period. Because the district court did not find the two-year limitations period unconscionable, this aspect of the CSA is revived. The other provisions remain unenforceable as originally drafted. We, of course, do not rule on the legality of any changes to the CSA since the district court's decision. Costs on appeal are awarded to appellees.

AFFIRMED in part and REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C 01-02969 BZ

DARCY TING, *et al.*,

Plaintiffs,

v.

AT & T,

Defendant.

Filed Jan. 15, 2002

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ZIMMERMAN, United States Magistrate Judge.

In this action, defendant American Telephone and Telegraph Company ("AT & T") is being sued by its California customers for attempting to impose a new contract containing provisions which allegedly violate California contract and consumer protection laws.[1] The complaint was filed in Alameda County Superior Court the day before the new contract was to start taking effect. Defendant immediately removed the action to this court, invoking this court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. Plaintiffs' motions for a temporary restraining order and for a preliminary injunction were denied. Following stipulation of the parties, this case was certified as a class action pursuant to Fed. Rule Civ. P. 23(a) & (b). Trial commenced on November 13, 2001. Having considered and weighed all the evidence and

[1] The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings, including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

having assessed the credibility of the witnesses, I now make these findings of fact and conclusions of law as required by Fed. Rule Civ. P. 52(a).

A. THE PARTIES

1. Plaintiff DARCY TING is a California resident over the age of 18 residing in Berkeley, California. She is presently an AT & T long distance customer, and has been one since approximately 1994. She is employed as a community consumer advocate by plaintiff CONSUMER ACTION.

2. Plaintiff CONSUMER ACTION is a non-profit membership organization committed to consumer education and advocacy. Established in 1971, CONSUMER ACTION is incorporated in California with headquarters in San Francisco, and has approximately 1,500 members nationwide. CONSUMER ACTION is actively involved in policy and legislative advocacy on telephone and utility issues on behalf of consumers at both the state and national levels.

3. Defendant AT & T is a New York corporation with its principal place of business in Basking Ridge, New Jersey. It provides numerous telecommunications, information and other services to residential and business customers throughout the United States. As one example, AT & T offers interstate long distance telephone service to approximately sixty million residential consumers throughout the United States and approximately seven million residential consumers in California. AT & T has offices in California and elsewhere in which it does business related to its residential long distance service.

B. DETARIFFING BACKGROUND

4. From the passage of the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* ("FCA"), until August 1, 2001, AT & T and other carriers providing interstate long distance service to consumers were required to file with the Federal

Communications Commission ("FCC") and print and keep open for public inspection a listing of the terms and conditions under which they would provide services to their customers. *See id.* § 203. This listing, called a tariff, also set out the charges, classifications, practices and regulations for each particular service. Once filed, the tariff was subject to FCC regulation and approval. *See id.* § 204. If approved, the tariff exclusively controlled the rights and liabilities of the parties as a matter of law, and "[t]he rights as defined by the tariff [could not] be varied or enlarged by either contract or tort of the carrier." *AT & T v. Central Office Telephone*, 524 U.S. 214, 227, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (quoting *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163, 43 S.Ct. 47, 67 L.Ed. 183 (1922)).

5. The FCA permits a person harmed by a carrier to file a complaint with the FCC or to bring suit in district court for the recovery of damages. *See* 47 U.S.C. § 207. In interpreting the FCA's tariff requirements, the courts developed the filed rate doctrine which prohibited a regulated entity from charging rates "for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). The doctrine also prevented "an aggrieved customer from enforcing contract rights that contravene[d] governing tariff provisions or from asserting estoppel against the carrier." *Fax Telecommunicaciones v. AT & T*, 952 F.Supp. 946, 951 (E.D.N.Y.1996). Because the rate making procedures and resulting tariffs were public documents, the consumer's knowledge of the published rate was presumed. Consequently, claims of carrier misrepresentation were barred, *see AT & T v. Central Office Telephone*, 524 U.S. at 222, 118 S.Ct. 1956 (citing *Kansas City Southern R.R. Co. v. Carl*, 227 U.S. 639, 653, 33 S.Ct. 391, 57 L.Ed. 683 (1913)), as were claims for breach of contract involving fraudulent carrier conduct relating to privately negotiated lower rates. *See Wegoland, Ltd. v. NYNEX Corp.*,

27 F.3d 17, 22 (2d Cir.1994). Although the doctrine sometimes led to seemingly harsh and unfair results, *see Maislin Indus., U.S., Inc. v. Primary Steel Inc.*, 497 U.S. 116, 130-31, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97, 35 S.Ct. 494, 59 L.Ed. 853 (1915), courts left the enforcement of tariffs to the regulators, who were seen as best situated to determine whether the regulated entities were engaging in fraud or other illegal conduct. *See Wegoland*, 27 F.3d at 21.

6. After the decision in *United States v. AT & T*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983), in which AT & T was divested and the pay telephone operations of the Bell operating companies were separated from those of AT & T, a number of lawsuits were filed by consumers in response to business practices, such as slamming, that arose as carriers started competing to provide long distance telephone services. Notwithstanding the filed rate doctrine, the courts began to permit a number of these lawsuits, including a number of class action suits. *See, e.g., Marcus v. AT & T*, 138 F.3d 46, 62-63 (2d Cir.1998) ("[A] suit for injunctive relief appears not to interfere with the nondiscrimination policy underlying the filed rate doctrine . . . . [I]f the appellants can establish the substance of their state and federal common law fraud claims, the filed rate doctrine would not bar them."); *Gelb v. AT & T*, 813 F.Supp. 1022, 1032 (S.D.N.Y.1993) (filed rate doctrine inapplicable to a class action which alleged universal fraud and concealment of rates because the claim did not implicate the core concerns of the doctrine); *Day v. AT & T*, 63 Cal.App.4th 325, 331, 74 Cal.Rptr.2d 55 (1998) (filed rate doctrine does not apply to bar a class action seeking to enjoin misleading or deceptive practices under state consumer protection laws). *See also* cases cited *infra* ¶ 63.

7. In the Telecommunications Act of 1996, Congress directed the FCC to forbear from applying any provision of the FCA if the FCC found that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a) (1996). One of the principal purposes in passing this Act was to "make it possible for the FCC immediately to forebear [sic] from economically regulating each and every competitive long-distance operator . . . ." 141 Cong. Rec. S7881-02, S7888 (1995). As Congressman Cox stated, deregulation would take the country out of the "regulatory thicket that has shackled the industry." *Communications Law Reform: Hearings Before the Subcomm, on Telecommunications and Finance of the Comm. on Commerce House of Representatives*, 104th Cong. 15 (1995). Senator Slade Gorton emphasized that the Act would allow:

> States to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and *safeguard the rights of consumers, which are, of course, the precise goals of this Federal statute itself.*

141 Cong. Rec. S8206-02, S8212 (1995) (emphasis added).

8. As part of deciding whether to forbear from enforcing § 203 of the FCA pursuant to this statutory authority, the FCC issued a series of notices and orders which established the

FCC's intent to abolish the filed rate doctrine. In describing its preference for complete detariffing rather than permissive detariffing, the FCC stated:

> Complete detariffing would also further the public interest by eliminating the ability of carriers to invoke the 'filed-rate' doctrine. . . . In addition, complete detariffing would further the public interest by preventing carriers from unilaterally limiting their liability for damages. Accordingly, by permitting carriers unilaterally to change the terms of negotiated agreements, the filed rate doctrine may undermine consumers' legitimate business expectations. Absent filed tariffs, the legal relationship between carriers and customers will much more closely resemble the legal relationship between service providers and customers in an unregulated environment. Thus, eliminating the filed rate doctrine in this context would serve the public interest by preserving reasonable commercial expectations and protecting consumers.

Second Report and Order In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, ("*Second Report and Order*"), 11 F.C.C.R. 20,730, ¶ 55, 1996 WL 633345 (1996). The FCC also stated that "[t]he public interest benefit of removing carriers' ability to invoke the 'filed-rate' doctrine applies equally with respect to terms and conditions as to rates." *Id.* ¶ 155. Significantly, the FCC envisioned its own complaint procedures existing concurrently with judicial remedies in the new detariffing regime. "In the absence of such tariffs, consumers will not only have our complaint process, but will also be able to pursue remedies under state consumer protection and contract laws." *Id.* ¶ 42. The FCC noted that "in the absence of tariffs, consumers will be able to pursue remedies under state consumer protection and contract laws in a manner currently precluded by the 'filed rate' doctrine." *Id.* ¶ 38.

9. AT & T filed a Petition for Limited Reconsideration and Clarification with the FCC in an attempt to resolve what it thought was an ambiguity in the Commission's position on whether the FCA would continue to govern the reasonableness of rates, terms and conditions of interstate service. The FCC granted in part and denied in part AT & T's petition, stating:

> the [FCA] continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory. [However,] *we note that the [FCA] does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment.* As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.

Order on Reconsideration In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace ("Order on Reconsideration"), 12 F.C.C.R. 15,014, ¶ 77, 1997 WL 473330 (1997) (emphasis added).

10. The FCC finally determined, in a series of Orders upheld by the Court of Appeals for the District of Columbia Circuit, *see MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir.2000), to exercise its forbearance authority under the Telecommunications Act of 1996 to end the practice of setting rates, terms and conditions through tariffs pursuant to the FCA. Instead, the FCC required long distance carriers to establish contracts with their residential long distance consumers that would govern the rates, terms, and conditions of interstate long distance service. The FCC initially set a date of January 31, 2001, for the mandatory "detariffing" of interstate domestic interexchange services, which it extended twice, first to April 30, 2001, then to July 31, 2001. Thus,

beginning August 1, 2001, all long distance carriers had to form contracts with their existing long distance residential customers.

11. The FCC has posted a web page entitled "Detariffing Interstate Long Distance Telephone Service: What Customers Need to Know." It states in part:

> *What protections do I have, now that companies don't have to file anything with the FCC?* You are protected by the full range of state laws, including those governing contract, consumer protection, and deceptive practices. For example, state contract law determines what constitutes an agreement between you and your long distance company.
>
> *Where do I file a complaint if I have problems with my interstate long distance service company?* You may contact your state consumer protection agency, Better Business Bureau, or State Attorney General Office to learn about the protections and remedies available under your state contract and consumer protection laws. You may also file a complaint with the FCC if an interstate long distance company has violated FCC rules.

(Pls.' Ex. 205-2.)

12. As a result of the FCC's decision to order detariffing, absent the contract provisions in dispute here, class members would have the same rights to sue AT & T in court as would any person doing business with AT & T, unless the suit is over a service governed by a tariff which survived detariffing, such as AT & T's "dial around" service.

C. AT & T'S RESPONSE TO DETARIFFING

13. To prepare to do business after detariffing, AT & T formed a detariffing team composed of dozens of individuals from several AT & T departments under the overall supervision of Louis Delery, Vice President for Consumer Long

Distance Services. The team commenced work in the summer of 2000. AT & T eventually spent approximately $30 million to implement its detariffing obligation, which included the development of a standardized contract for use with its customers. AT & T called the contract the Consumer Services Agreement ("CSA").

14. AT & T decided in early 2000 to include in the CSA a series of provisions designed to limit the parties' rights and remedies in the event of a dispute. In the final version of the CSA, these provisions are contained in sections 4 and 7 (hereinafter, the "Legal Remedies Provisions").

15. For many years, AT & T has sponsored the AT & T Consumer Strategy and Issues Council ("AT & T Consumer Council" or "Council"). The Council is composed of consumer advocates and meets five to six times per year. Ken McEldowney, executive director of plaintiff CONSUMER ACTION, has served as Chair of the Council for the past several years, and has served on the Council for approximately fifteen years.

16. AT & T decided to include the Legal Remedies Provisions in the CSA before a draft was presented to the Consumer Council, and was not willing to change its decision regardless of how the Council reacted. In a series of internal e-mails, AT & T officials stated that "we owe the Council a response before we set things in stone . . . . [W]e want to gauge their reaction on what we're willing to change and what we're not—especially arbitration," (J. Ex. 39-1), and "[A]lthough the Consumer Panel had strong opinions against binding arbitration, Legal's recommendation was equally strong that it remains as a condition of the Service Agreement." (Pls.' Ex. 134-1.)

17. Drafts of the CSA, a cover letter to customers, and a set of Frequently Asked Questions ("FAQs") were discussed at two Consumer Council meetings, September 20, 2000, and

April 5, 2001. Members of the Council, including Mr. McEldowney, expressed substantial concern about parts of the Legal Remedies Provisions such as the binding arbitration provision in the CSA, raised questions about the enforceability of portions of the Legal Remedies Provisions under California law, and raised concerns about the clarity of some portions of the CSA and a need for foreign-language translations.

18. These concerns were noted by AT & T. A memo entitled "Detariffing Briefing with Consumer Council, Wednesday, September 20, 2000," states in part:

> Dispute Resolution—this component of the service agreement is very objectionable to the advocates. They have a philosophical aversion to the concept of mandatory arbitration as a means to satisfy consumer disputes. They were particularly troubled by the clause preventing customers from participating in class action suits against AT & T. One influential member threatened to resign from the council if we adopt this clause.

(J. Ex. 13-1.)

19. AT & T tried to justify to the Council the need for the Legal Remedies Provisions by referring to the costs associated with class action lawsuits. AT & T was asked to provide information regarding these costs and the burden they allegedly place on AT & T, but did not do so.

20. Members of the Consumer Council, especially Mr. McEldowney, objected to AT & T's desire to implement the CSA without requiring any affirmative assent from its customers—the so called "negative option."[2] While the

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[2] Much of the trial testimony centered around AT & T's decision to present the CSA as a "negative option"—as an offer that could be accepted by doing nothing other than continuing to use AT & T's service even when the customer was not aware of the offer. Plaintiffs argue that this manner of contract formation is unacceptable in California, at least

Council suggested at least one alternative, AT & T determined to implement the CSA as a negative option. AT & T believed that a significant number of its customers would never affirmatively signify their assent to the CSA, that any process designed to obtain individualized informed consent to legal services would be very expensive, and that no such process was likely to produce a response from all or most of AT & T's approximately sixty million residential long distance consumers.

21. AT & T's acceptance of the Council's input was limited to the means by which the Legal Remedies Provisions were communicated to AT & T's customers, rather than the substance of the provisions themselves. For example, AT & T improved some of the contract language, though the language of the Legal Remedies Provisions remained substantially the same, and translated the contract documents into other languages.

22. AT & T conducted market research to assist it in developing the contract documents. One part of AT & T's research, the Quantitative Study, included the following key findings and recommendations:

> In the letter it should be made clear that this agreement is being sent for informational purposes only. The fact that no action is required on the part of the customer needs to be made. [sic] A strong link establishing that

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with respect to an offer that requires a waiver of jury trial, given that the right to a civil jury trial is guaranteed by the California Constitution and given the strict requirements under California law for validly waiving that right in a variety of contexts. *See* Cal. Const. art. I, § 16. *See also Isbell v. County of Sonoma,* 21 Cal.3d 61, 145 Cal.Rptr. 368, 577 P.2d 188, *cert. denied,* 439 U.S. 996, 99 S.Ct. 597, 58 L.Ed.2d 669 (1978) (invalid waiver of right to jury trial in cognovit note); *Exline v. Smith,* 5 Cal. 112 (1855) (invalid waiver of jury trial by court rule). Because I have concluded that AT & T's offer contained illegal and unconscionable terms which must be enjoined, I do not reach this contract formation issue.

> this information is not a 'call to action' on the part of the customer should be clearly stated in the letter . . . . Customers should understand that the mailing is being sent to comply with a federal mandate and does not imply any change in their relationship with AT & T.

(J. Ex. 10-6.)

23. Another part of AT & T's research, the Qualitative Study, concluded that after reading the bolded text in the cover letter which states *"[p]lease be assured that your AT & T service or billing will not change under the AT & T Consumer Services Agreement; there's nothing you need to do,"* "[a]t this point most would stop reading and discard the letter." (J. Ex. 9-9.) One of the authors of the study-did not find this conclusion to be a cause of concern, and no one on the detariffing team ever expressed concern to her about this conclusion.

24. On the contrary, AT & T was concerned that if its customers focused on the Legal Remedies Provisions, they might become concerned, less likely to perceive detariffing as a non-event and possibly defect. As a high ranking member on the detariffing team stated: "I don't want them to tell customers that now individual contracts need to be established with customers and pay attention to the details [sic]." (Pls.' Ex. 132-1.) While presenting the CSA as a non-event may have helped AT & T retain its customers, it also made customers less alert to the fact that they were being asked to give up important legal rights and remedies.

D. AT & T'S MAILING OF THE CSA

25. Between May 2 and June 9, 2001, AT & T mailed the CSA, a cover letter, and the FAQs to approximately eighteen million of its residential long distance customers whom it bills directly by including these materials in the envelope that contained the customer's bill (hereinafter, the "billing mailing"). No statement regarding the CSA appeared on the

outside of the envelope. The CSA, cover letter and FAQs are attached at the end of these findings and conclusions as "Attachments 1-3," respectively.

26. The billing mailing was highly likely to be opened. However, a reasonable class member would not have expected the billing statement to contain a new contract, and therefore might well have discarded the CSA as a stuffer. A class member would have been more likely to read the CSA had the envelope stated that a new contract was included with the bill, which AT & T did not do.

27. To its remaining forty-two million residential long distance customers, AT & T mailed the CSA, a cover letter and the FAQs in a separate envelope (hereinafter, the "separate mailing"). On the outside of this envelope appeared the statement: "*ATTENTION:* Important Information concerning your AT & T service enclosed." This envelope is attached at the end of these findings and conclusions as "Attachment 4." A substantial number of class members did not open the separate mailing and therefore were unaware, as they continued to use their service, that AT & T would consider that they had agreed to a new contract. AT & T's Quantitative Study had concluded that approximately 1/4 of its customers "are not even likely to open the [separate mailing]." (J. Ex. 10-4.) AT & T's Quantitative Study had found that approximately 10% of its customers would not even skim or glance at the CSA contained in the separate mailing, and only 30% of its customers would actually read the entire CSA. This is consistent with plaintiffs' research presented in the Lake-Snell survey.

28. The Lake-Snell survey commissioned by plaintiffs concluded that the vast majority of class members had either not opened or not read the CSA. However, this survey is flawed at least with respect to the absence of screening procedures to determine whether survey participants were AT & T residential long distance customers, and if they were,

whether they were the household member who would have dealt with a mailing from AT & T. (Pls.' Ex. 209-7-9, Questions 1, 4-5, 9, 14-15.) With regard to the participants that actually received and read the CSA, the survey is helpful and discloses the expectation of many consumers that before they can be bound to a contract they must in some affirmative fashion manifest their voluntary assent. (*Id.*, Questions 6-8, 10, 12-13.) While I attached less weight to the responses to questions 2-3 and 11, since the form of the questions could have been improved, I could not ignore the clear trend of these answers, which indicate that people are unlikely to read solicitations received in the mail, even if from AT & T. Nor could I ignore their consistency with the results of AT & T's research.

29. The phrase "Important Information" is increasingly associated with junk mail or solicitations. AT & T was aware of this from the research of its Qualitative Study. The person managing AT & T's detariffing communications testified that AT & T and others who send mailings to customers overuse the phrase "Important Information," although she claimed that associating the phrase with junk mail "may be an exaggeration."

30. From the perspective of affecting a person's legal rights, the most effective communication is generally one that is direct and specific. In this case, that would have been to boldly place on the separate mailing envelope at least the message that a new contract was enclosed rather than the generic "Important Information" notification.

31. During July 2001, plaintiff DARCY TING received in the mail from AT & T and opened and read the "separate mailing." Prior to receiving this mailing, plaintiff TING was not aware of the obligation that AT & T or other long distance carriers had to establish a contract with their residential customers. She was not expecting to receive a mailing from AT & T concerning the CSA or detariffing.

32. In the summer of 2001, most class members did not expect to receive a new contract from AT & T, let alone one which could be accepted by performance. Class members, like any consumers in an ongoing relationship with a business, have a reasonable expectation that material changes to the relationship will be communicated to them. AT & T's methods of communicating the new CSA downplayed the material changes presented by the Legal Remedies Provisions.

33. Of the people who opened either mailing, a substantial number likely did not read it at all and a larger number did not read it thoroughly. This was exacerbated by the message in the documents that the customer would not have to do anything upon their receipt and by AT & T's overall message of reassurance to its customers that detariffing was a "non-event." The cover letter introduced the concept of assent by non-action by bolding the statement: "*Please be assured that your AT & T service or billing will not change under the AT & T Consumer Services Agreement; there's nothing you need to do.*"

34. The CSA was an offer which by its terms could be accepted without anyone needing to sign and return a document. According to the second paragraph of the CSA:

> *BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THESE PRICES, CHARGES, TERMS AND CONDITIONS, DO NOT USE THE SERVICES, AND CANCEL THE SERVICES IMMEDIATELY BY CALLING AT & T AT 1 888 288-4099* FOR FURTHER DIRECTIONS.*

The CSA recites that it would become effective as a contract beginning on August 1, 2001.

35. Consumers with local telephone service may use AT & T's long distance service without being subject to the terms of the CSA by using AT & T's dial-around service, 10-10-345. This service allows consumers to make long distance calls through AT & T that are billed to them by their local phone company. Consumers who use AT & T's dial-around service are not parties or subject to the CSA. AT & T did not present this service to class members as an alternative to the CSA. The CSA and the FAQs simply and inconspicuously mention that the CSA does not apply to "calls made by dialing 10-10-345." If AT & T intended this service to be an alternative for those customers who did not want to accept the Legal Remedies Provisions, as it now contends, it should have presented it as an alternative in the mailing.

36. The CSA is a pre-printed document drafted and prepared entirely by AT & T. If a California AT & T long distance customer contacted AT & T and expressed unhappiness with any of the Legal Remedies Provisions, AT & T did not provide that person with an opportunity to negotiate those terms because of its policy prohibiting any waiver or modification of the CSA.

E. CUSTOMER CHOICE

37. The market for residential long distance services is highly competitive. Nationally, more than 700 companies provide long distance telephone service. In California, at least 19 companies provided long distance telephone service in the summer of 2001. In the second quarter of 2001, the market share of residential long distance service in California, measured by the number of residential customers selecting a particular carrier as their primary long distance carrier, was as follows: 44.0% for AT & T; 14.2% for MCI; 8.8% for Verizon; 5.0% for Sprint; 1.7% for Qwest; 0.7% for Working Assets; and 25.6% for all other companies.

38. Since the FCC ordered detariffing, AT & T is not the only long distance provider who has attempted to include legal remedies provisions containing a mandatory arbitration clause in its agreement with its customers. MCI, Sprint, Qwest and Working Assets Long Distance (among other companies) have also sought to impose similar provisions. The long distance providers who have imposed substantially similar legal remedies provisions have a combined market share of well over 65% of all California long distance customers.

39. Verizon California, a carrier with 8.8% of the residential long distance service market in California as of the second quarter of 2001, does not require its residential long distance customers to agree to binding pre-dispute arbitration or to waive class actions.

40. Customers did not have any meaningful choice with respect to the Legal Remedies Provisions because the carriers who service 2/3 of the California market all include substantially similar dispute resolution provisions in their contracts. AT & T customers who specifically complained about the unfairness of the arbitration provision were sent a written response which in part told them, "All of the other major long distance carriers have also included an arbitration provision in their service agreements." (Pls.' Exs. 177, 186.)

41. In the summer of 2001, it would have been difficult for class members to have learned the identity of the minority of carriers who did not impose legal remedies provisions substantially similar to those of AT & T. It would have been virtually impossible for class members who do not have internet access or are not sophisticated internet users.

42. The principal features upon which consumers choose a carrier are price and service, not legal remedies provisions, since the typical consumers do not expect to have a dispute with their long distance carriers that cannot be resolved

informally. A class member dissatisfied with price and service can change carriers easily. A class member dissatisfied with her legal remedies can change carriers once the problem that invokes those remedies has occurred, but she is locked into the remedies in the contract in effect at the time the problem arose.

43. Class members calling with questions about the Legal Remedies Provisions were unlikely to get meaningful answers. Frequently, they would be referred to the written materials or to a recording. AT & T's customer representatives and their supervisors were instructed not to discuss arbitration.

44. AT & T's position is best summarized by a document entitled "Detariffing—Customer Handling Experience," which was circulated to managers involved in the detariffing process. It states in part: "Canned responses will be provided to service reps which will reinforce that the customer needs to do nothing and will direct them to the IVR, website or to write-in for additional information." (J. Ex. 45-2.)

F. AT & T'S LITIGATION EXPERIENCE

45. The Legal Remedies Provisions attempt to limit the class members to four dispute resolution mechanisms: (i) informal contact with AT & T's customer account representatives; (ii) an action in small claims court; (iii) a complaint to a federal or state agency; and (iv) binding arbitration before the American Arbitration Association ("AAA").

46. The undisputed testimony is that 99% of all customer complaints about billing and service are resolved through informal contact with customer representatives.

47. California class members may bring an action in small claims court for claims up to $5,000. The filing fee for such actions is generally $20.00. A class member who files in small claims court must represent herself. In the year 2000,

AT & T was named as a defendant in 367 small claims court cases, of which 55 were filed in California.

48. In 2000, AT & T was named as a defendant in 59 consumer long distance suits filed in other courts (not small claims courts) nationwide. It appears that the principal types of claims which members of the class can expect to litigate outside small claims court are not individual billing disputes or disputes about poor service, but claims of intentional misconduct, such as discrimination or harassment in the course of providing service, credit reporting problems and problems relating to identity theft and claims that involve practices or problems that pertain to all or a group of consumers. Examples of group claims include complaints about the way AT & T is measuring the length of a call or complaints that AT & T has misrepresented the terms of a calling plan in its advertising. If a consumer complains about such a practice, AT & T can try to satisfy the consumer by making a billing adjustment, but it cannot change its practice as to only that consumer without being considered discriminatory under the FCC's standards. In other words, if AT & T decided on an informal basis to measure the length of one class member's phone calls a certain way, it would be discriminating in violation of the FCA if it measured the calls of other similarly situated class members differently.

49. Under the CSA, if (a) the amount at issue in a dispute between a class member and AT & T is $10,000.00 or less, exclusive of interest, arbitration fees, and costs; (b) the claimant in the dispute chooses to arbitrate the dispute; and (c) the claimant chooses to arbitrate by submitting documents ("desk arbitration") or by telephonic hearing, the AAA's Consumer Rules will apply.

50. Rule 6 of the AAA Consumer Rules states:

> A party may request in writing that the arbitrator hold one hearing by telephone. The telephonic hearing may

> occur even if the other party refuses to participate. An additional $100 fee will be charged to the business for a telephonic hearing. If a party wants to have an in-person hearing, instead of a telephonic hearing, the dispute must be administered under the AAA's Commercial Arbitration Rules.

(J. Ex. 15-5.)

51. If the consumer chooses to have an in-person arbitration hearing, or the claim is in excess of $10,000, the AAA's Commercial Rules and fee schedules apply. Under the Commercial Rules, for claims of $1.00 to $10,000, the AAA's filing fee is currently $500. For claims between $10,000 and $75,000, the AAA's filing fee is $750. For claims between $75,000 and $150,000, the AAA's filing and service fees total $2000. The AAA's Commercial Rules require each party to bear the expenses of the witnesses it produces. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, any witness or the cost of any proof produced at the direct request of the arbitrator are shared equally by the parties, unless they agree otherwise or unless the arbitrator assesses those expenses or some portion of them against a party in the award.

52. Rule 51 of the AAA's Commercial Rules, entitled "Administrative Fees," states:

> As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable.
>
> The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may,

> in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

(J. Ex. 16-18.)

53. Rule 54 of the AAA's Commercial Rules, entitled "Deposits," states:

> The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(J. Ex. 16-19.)

54. AT & T subsidizes a customer's cost of initiating either a document or telephonic arbitration of a claim of under $1,000. Normally, the AAA charges consumers $125 as the standard filing fee for such a proceeding. This fee is intended to cover one half of the arbitrator's fee ($250). Under Section 7(c) of the CSA, however, AT & T will pay all but twenty dollars of that fee plus all other AAA costs and fees for claims under $1,000. For claims above $1,000 but below $10,000 arbitrated on documents or telephonically, the customer would pay the full filing fee of $125 and AT & T would pay all other AAA costs. For those customers who elect to proceed with a live arbitration proceeding or assert a claim in excess of $10,000, the AAA requires that the arbitration proceeding be subject to the AAA's Commercial Rules. The prevailing party may seek to recover the AAA's fees and the expenses of the arbitrator from the other party.

55. Rule 53(b) of the AAA's Commercial Rules, entitled "Neutral Arbitrator's Compensation," states, "[a]rbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation, beginning with the first day of hearing in all cases with claims exceeding $10,000." (J. Ex. 16-19.)

56. Different AAA arbitrators charge different hourly rates. To estimate the costs of an arbitration to be conducted under the AAA's Commercial Rules, a claimant must learn the hourly rate of the arbitrator who will hear the case. To determine the hourly rate of the specific AAA arbitrators who may hear a particular case under AAA's Commercial Rules, a claimant must first initiate an arbitration with the AAA and, unless the fee is waived or deferred by AAA, must pay any filing fee. This makes it difficult for a class member before filing to meaningfully estimate the cost to have the case arbitrated under the Commercial Rules. Neither the AAA website or rules, nor the AT & T website, provides a class member with any information about likely arbitrator's fees.

57. A random sampling compiled by an AAA Vice President of 82 arbitrators on the AAA Commercial Panel in Northern California provides the following compensation information: (a) arbitrator compensation ranges from $600 to $3,850 per day; (b) the average (mean) daily rate of arbitrator compensation is $1,899; (c) the median daily rate of arbitrator compensation is $1,750.

58. While AAA has a list of arbitrators willing to arbitrate matters on a pro bono basis, the Commercial Rules include no information from which a claimant could learn about the existence of its pro bono panel, or how to request that one be assigned to a pro bono arbitrator. AAA's designated representatives on the subject of the waiver and deferral of arbitration fees were unable to say how many arbitrators currently serve or have served on pro bono panels in California, or how many cases have been handled by pro bono arbitrators.

59. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce its administrative fees. A party seeking a deferment or reduction must supply the AAA with financial details documenting the claim of extreme hardship in affidavit form. The party must also provide AAA

with copies of the past two years federal tax returns, along with bank statements for the past three months. Further financial records and documentation could be requested, depending on the case.

60. No AAA rule governs when it will or will not waive or defer its administrative fees. No publicly available documents describe the criteria used for determining what constitutes extreme hardship. There are no internal AAA documents that define or discuss how waivers or deferrals should be granted. The last two people responsible for evaluating such requests received no training or instruction in how to evaluate such requests.

61. Although AAA frequently grants requests for administrative fee reductions, waivers or deferrals, it rarely waives or defers its fees entirely. Instead, AAA more typically defers a portion of its fees to a later date in the proceeding, such as the hearing.

62. Based on AT & T's testimony, it is unlikely that the typical customer dispute about service or under $1000 will be resolved through arbitration; it most likely will be resolved by AT & T's customer care representatives or their supervisors. Fewer than one percent of customer complaints not resolved by customer care representatives or their supervisors have resulted in litigation.

63. In recent years, the following are among the lawsuits filed against AT & T and its competitors by their customers that were not barred by the filed rate doctrine:

a. A putative class action case captioned *Allen v. AT & T* pending in the District Court for Muskogee County, Oklahoma, alleging AT & T fraudulently and in breach of contract collected a municipal sales tax which was either (1) not authorized by law or (2) not remitted in full to the proper taxing authority. Plaintiff is seeking restitution, a declaratory judgment and other damages. His individual claim is less than $1 a month.

b. *In re* AT *& T Consumer Class Action Litigation* (also captioned *Freedman v. AT & T*), which was settled in the Superior Court of New Jersey, Somerset County, Law Division, on July 27, 2000. According to the Settlement Agreement, the alleged overcharges involved AT & T's practice of charging class members for certain per-minute usage charges in a month subsequent to the month in which the usage occurred, even when the subscribers had not used all of their contractually-provided for minutes for either the month in which the usage occurred or the month in which the subscriber was billed for the usage. AT & T ultimately paid $1.98 million, which was 100% of the 83,611 class members' damages, as well as the costs of notice and settlement administration.

c. In a suit against one of AT &T's competitors, *In re: MCI Non-Subscriber Telephone Rates Litigation,* MDL Docket No. 1275 (S.D.Ill.), the plaintiffs alleged that MCI had improperly charged higher Non-Subscriber Rates and Surcharges for certain long distance calls. A settlement reached in October of 2000 created an $88 million Settlement Fund.[3]

64. It would not have been economically feasible to pursue the claims in these cases on an individual basis, whether the case was brought in court or in arbitration. If the Legal Remedies Provisions contained in AT & T's new CSA had governed customers' rights in these situations, it is highly unlikely any of the claims would have been prosecuted. It is undisputed that the lawyers who represented the plaintiffs in

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[3] *See also Lipton v. MCI WorldCom, Inc.,* 135 F.Supp.2d 182, 189 (D.D.C.2001) (putative class action against MCI for charging higher rates for long distance calls than were authorized under the appropriate tariff was not barred by the filed rate doctrine); *Crump v. WorldCom, Inc.,* 128 F.Supp.2d 549, 556 n. 4 (W.D.Tenn.2001) (citing *AT & T v. Central Office Telephone,* 524 U.S. at 222, 118 S.Ct. 1956 (1998)) (the filed rate doctrine does not bar plaintiffs from pursuing "state law claims based upon long distance provider's misrepresentation.").

these cases would not have taken them if the only claim they could have pursued was the claim of the individual plaintiff. The reasons for this are not hard to see. The actual damages sought by the named plaintiffs are relatively insubstantial. The damage limitations in the Legal Remedies Provisions attempt to make any award of substantial damages, even if justified, highly unlikely. Consequently, it would not make economic sense for an attorney to agree to represent any of the plaintiffs in these cases in exchange for 33 1/3 % or even a greater percentage of the individual's recovery. The lawyer would almost certainly incur more in costs and time charges just getting the complaint prepared, filed and served than she would recover, even if the case were ultimately successful. Simply put, the potential reward would be insufficient to motivate private counsel to assume the risks of prosecuting the case just for an individual on a contingency basis. While retaining counsel on an hourly basis is possible, in view of the small amounts involved, it would not make economic sense for an individual to retain an attorney to handle one of these cases on an hourly basis and it is hard to see how any lawyer could advise a client to do so. The net result is that cases such as the ones listed above will not be prosecuted even if meritorious. Thus, the prohibition on class action litigation functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, would serve to shield AT & T from liability even in cases where it has violated the law.

65. There likely will be other claims which a class member may have in which potential damages would ordinarily be much more than nominal. Examples include discrimination or harassment in the provision of service, identity theft, fraudulent sales tactics, or harassing debt collection techniques. In such cases, the costs associated with preparing an arbitration claim and presenting it for even a "desk arbitration" would likely exceed the recovery any consumer could reasonably expect to obtain given the cost of arbitration

and the limitations on damages and attorneys fees in the Legal Remedies Provisions. These Provisions make it unlikely that a class member, unless she wanted to represent herself, would be able to pursue many of the sorts of claims that are to be expected in the ordinary business-customer relationship. And as one consumer attorney pointed out, cuts in funding make it unlikely that legal aid programs will have the resources to address such cases or would give them attention given the larger grievances of other clients.

66. AT & T did not produce any testimony from any practicing lawyer, or any other evidence, that any of the cases discussed in paragraph 63 would be economically feasible to litigate under the Legal Remedies Provisions of the CSA. There was some conclusory contradiction from one of defendant's experts, Professor Priest, which I did not find convincing inasmuch as he does not practice in this area and his conclusions were largely unsupported by any evidence. Instead, it contends that such claims should be pursued before the FCC.

67. The FCC has a complaint procedure that enables AT & T customers to file claims against AT & T with the FCC. The claim procedure is explained, among other places, on a website maintained by the FCC at www.fcc.gov. The website describes procedures for filing both formal and informal complaints, contains links to on-line complaint forms and other related sites, and provides contact and other information on related topics, such as how the FCC processes consumer complaints that it receives.

68. A review of FCC reports for the past ten years discloses that until recent years there are very few reports of FCC decisions involving a complaint by an individual consumer against a long distance carrier. Most of the complaints in recent years have concerned "slamming," the unauthorized substitution of a consumer's preferred long distance carrier for another without proper consent. It was largely undisputed

at trial that it took the FCC approximately seventeen years before it effectively responded to "slamming" complaints.

69. In recent years, in response to consumers' complaints, the FCC has initiated investigations which ultimately resulted in changes in telephone company practices and in the imposition of forfeitures, or the payment of "voluntary contributions," to the United States Treasury. At defendant's request, I took judicial notice of 14 orders of the FCC adopting consent decrees or imposing forfeitures or notices of apparent liability, all of which issued during the year 2000. With the exception of *In the Matter of MCI WorldCom Communications, Inc.,* 15 F.C.C.R. 12,181 (2000), in which the FCC approved a mechanism for providing some credit to certain consumers adversely impacted by the company's practices, *see id.* at 12,182, the FCC does not appear to have concerned itself with obtaining individual relief for the complainants, even in situations where the FCC has concluded the carrier committed an "egregious" practice.

70. For example, in *In the Matter of Business Discount Plan, Inc.,* 15 F.C.C.R. 14,461 (2000), the FCC imposed a forfeiture of $2.4 million against the company for willful or repeated violations of the act and previous FCC rules and orders. *See id.* at 14,474. Although the company appears to have refunded $12,144.53 to the thirty complainants that were the focus of the investigation, *see Order on Reconsideration In the Matter of Business Discount Plan, Inc.,* 2000 WL 1785129 at ¶ 13 (2000), nowhere in its order did the FCC require the company to pay damages or provide refunds to any of the other thousand of complainants who had led to the investigation.

71. This is not surprising, since the FCC has stated that it does not consider the award of damages to a class of individuals to be consistent with its consumer complaint procedures. *See Certified Collateral Corp. v. Allnet Communications Serv.,* 2 F.C.C.R. 2,171, 2,173, 1987 WL 344054

(1987) (FCC Rules do not contemplate class action complaints). In the matter of *Jeffrey Krauss v. MCI,* 14 F.C.C.R. 2,770, 1999 WL 55003 (1999), after MCI had paid Mr. Krause damages arising out of his slamming complaint, the FCC refused to consider an award of damages to a class of complainants who were similarly situated to Mr. Krause, even though it had found that MCI had violated Mr. Krause's rights by converting his phone and facsimile lines without his authorization in violation of § 64.1100 of the FCC's rules and § 258 of the FCA. *See id.* ¶¶ 7-8. Instead, the FCC required that each complainant file an individual complaint under Section 208 and noted that ruling otherwise "would in effect transform the Section 208 complaint proceeding into a class action suit, a result neither contemplated by nor consistent with, the private remedies created under Sections 206 through 209 of the Act." *Id.* ¶ 10. This limitation that the FCC has placed upon itself was recently recognized by the D.C. Circuit Court of Appeals. *See Hi-Tech Furnace Sys. v. FCC,* 224 F.3d 781, 792 n. 22 (D.C.Cir.2000). Nor have I seen a single report of the FCC addressing a consumer complaint for an intentional tort allegedly committed by a carrier. Under all these circumstances, I find that the FCC is not a forum before which a class member can effectively vindicate her right to recover damages from AT & T in a variety of contexts. Nor is the FCC an effective forum for a class of similarly situated consumers seeking to recover damages from AT & T for a class wide practice without each consumer having to file an individual complaint under Section 208.[4] Presumably, it was in recognition of factors such as these that caused Congress in

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[4] AT & T's contention assumes that the FCC has the resources and the desire to become the forum of choice for resolving consumer complaints, a subject about which there is considerable debate within the FCC. *See In the Matter of Qwest Communications Int'l, Inc.,* 15 F.C.C.R. 14,699, 14,702, 2000 WL 1006228 (2000)(Furchtgott-Roth, C., dissenting); *In the Matter of MCI WorldCom Communications, Inc.,* 15 F.C.C.R. at 12,207 (2000)(Furchtgott-Roth, C., dissenting).

enacting the FCA to give parties wronged by a carrier a choice of fora—the FCC or the courts. *See* 47 U.S.C. § 207.

72. As to AT & T's purpose in devising the Legal Remedies Provisions, Mr. Delery testified that AT & T "wanted to give the consumers a broad range of options" to resolve disputes, and that AT & T wanted to avoid "opening up the business to lawsuits that really have no merit." I find this testimony to have been somewhat disingenuous. Absent the Legal Remedies Provisions, consumers would have a broad range of legal options available, and the limitations on consumers' rights and remedies in the Legal Remedies Provisions apply to all suits, even those with merit. Based on all the evidence before me, I find that AT & T's principal purpose was to put sufficient obstacles in the path of litigants to effectively deter many claims from being pursued.

G. CALIFORNIA CONSUMER PROTECTION LAWS

73. The complaint seeks declaratory and injunctive relief, alleging that the Legal Services Provisions of the CSA violate California's Consumer Legal Remedies Act, Cal. Civ.Code §§ 1750, *et seq.* ("CLRA"), and California's Unfair Practices Act, Cal. Bus. & Prof.Code §§ 17200, *et seq.* ("UPA"). The parties agree that California law governs the question of whether the CSA is a validly formed contract. AT & T, while denying generally that the Legal Remedies Provisions violate California law, contends that this case presents only one issue governed by California Law—whether a valid contract was formed when AT & T mailed the CSA to the class and its members continued to use AT & T's service. Specifically, AT & T contends that whether its Legal Remedies Provisions are unconscionable is under California law not an issue of contract formation but rather a defense to contract enforceability, and that once a contract is formed, questions about its enforceability are governed either by the Federal Communications Act or by New York law, through a choice of law provision in the CSA.

74. AT & T is wrong. Under California law a party may prevent the formation of a contract which includes an unconscionable provision by enjoining the inclusion of that provision in the contract. In California, "[i]t is essential to the *existence of a contract* that there should be . . . a lawful object . . . ." Cal. Civ.Code § 1550(3)(Deering 1994) (emphasis added). "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." *Id.* § 1599. Something that is "contrary to the policy of express law" is unlawful. *Id.* § 1667. Here, one of the objects of the CSA, contained in the Legal Remedies Provisions, is to alter dramatically the legal landscape upon which disputes between AT & T and the class are to be resolved. The class contends, for reasons that will be discussed later, that AT & T is trying to achieve this object in ways that are illegal and unconscionable. If the class is correct, then under California contract law, the CSA is void as to those provisions and valid as to the remainder.[5] The provisions which sought to effect the unlawful object never come into legal existence. *See Tiedje v. Aluminum Taper Milling Co.*, 46 Cal.2d 450, 453-54, 296 P.2d 554 (1956)("A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity . . . ."); *First Nat'l Bank v. Thompson*, 212 Cal. 388, 405-06, 298 P. 808 (1931)(contract void due to illegality "has no legal existence for any purpose . . . . ").

75. The California mechanisms for resolving disputes about the legality of contract provisions include the two invoked by the plaintiff class: the CLRA and the UPA. The CLRA provides in pertinent part that:

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[5] In this action, the plaintiff class is not challenging any other provisions of the contract, so the balance of the contract will be presumed lawful.

> (a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer *are unlawful*:
>
> . . .
>
> (19) Inserting an unconscionable provision in the contract.

Cal. Civ.Code § 1770(a)(19)(Deering 1994 & Supp.2001) (emphasis added).[6]

76. A consumer who suffers damage as a result or use of any of the acts or practices declared to be unlawful under section 1770 may, as was done here, bring a class action to obtain injunctive or other relief. *See id.* §§ 1780(a), 1781(a). Significantly, the CLRA also contains an anti-waiver provision:

> "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy *and shall be unenforceable and void.*"

Id. § 1751 (emphasis added).

77. Notwithstanding defendant's assertions to the contrary, the CLRA was intended to allow courts to address the unconscionability of contract terms as an issue of contract formation. The plain language of the statute provides plaintiffs with the right to bring an action to enjoin a party from inserting an unconscionable provision into a contract, which is precisely what plaintiffs contend AT & T attempted to do by inserting the Legal Remedies Provisions in its offer. While the other party can always defend against an effort to enforce the illegal or unconscionable provision, that is not the other party's only recourse, as AT & T contends. The other

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[6] Section 1761 of the CLRA defines "person" to include a corporation. *See id.* § 1761.

party can also seek to enjoin operation of that provision, as plaintiffs have done here. *See California Grocers Ass'n v. Bank of America,* 22 Cal.App.4th 205, 217, 27 Cal.Rptr.2d 396 (1994)("[The CLRA] expressly permits a consumer to bring an action for damages and injunctive relief based on insertion of an unconscionable provision in a contract."); *Dean Witter Reynolds v. Superior Court,* 211 Cal.App.3d 758, 766-68, 259 Cal.Rptr. 789 (1989) (distinguishing the ability to bring an affirmative cause of action for unconscionability under the CLRA from the mere codification of the defense of unconscionability in Cal. Civ.Code § 1670.5, and applying the case law of unconscionability to the CLRA's affirmative cause of action).

78. An analysis of the UPA leads to the same conclusion. Under the statute, a plaintiff is entitled to injunctive relief against any person performing or proposing to perform an "unlawful, unfair or fraudulent business practice . . . ." Cal. Bus. & Prof.Code § 17200 (Deering 1992). The UPA recognizes the necessary interplay between the unfair competition provisions and other state laws, stating that "[u]nless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state." *Id.* § 17205. Prohibiting "any unlawful business act or practice" under the UPA includes prohibiting "anything that can properly be called a business practice and that at the same time is forbidden by law." *Barquis v. Merchants Collection Ass'n,* 7 Cal.3d 94, 113, 101 Cal.Rptr. 745, 496 P.2d 817 (1972). Accordingly, this broad standard encourages the UPA to "borrow" violations of other laws and treat these violations as independently actionable and subject to the distinct remedies contained in the UPA. *See Farmers Ins. Exchange v. Superior Court,* 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992). Courts have found that "placing unlawful or unenforceable terms in form contracts" constitutes "unfair business practices" for purposes

of imposing liability under the UPA. *See State Farm Fire & Casualty Co. v. Superior Court,* 45 Cal.App.4th 1093, 1104, 53 Cal.Rptr.2d 229 (1996), *questioned on other grounds, Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999). *See also California Grocers Ass'n,* 22 Cal.App. 4th at 218, 27 Cal.Rptr.2d 396 (suggesting that the UPA encompasses an affirmative cause of action for unconscionability). If the CSA violates the CLRA, it will also violate the UPA. Therefore, the legality and unconscionability of the Legal Remedies Provisions will be decided according to California law.[7]

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[7] AT & T argues that even if the issue of contract formation includes an analysis of the lawfulness of the Legal Remedies Provisions, federal law and FCC guidelines should govern rather than California state contract and consumer law. This will be addressed more thoroughly below. *See* discussion *infra* Part J. AT & T does not specify what federal law or FCC regulation would govern the unconscionability and illegality issues presented by the Legal Remedies Provisions. Suffice it to say that, in contrast to the Legal Remedies Provisions, the provisions approved under federal law by the United States Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), subjected the parties to the New York Stock Exchange Rules on arbitration, which allowed equitable relief, "collective proceedings," written arbitration awards summarizing the issues and available to the public, and had no apparent limitations on liability. *See id.* at 30-32.

AT & T alternatively argues that the lawfulness of the Legal Remedies Provisions should be governed by New York contract law pursuant to the choice-of-law provision in the CSA. I need not reach the issue. Putting aside the question of whether New York law would apply, *see Ticknor v. Choice Hotels Int'l,* 265 F.3d 931, 938 (9th Cir.2001), or what the New York consumer protection laws are, if the Legal Remedies Provisions are void because they are unlawful or unconscionable under California law, they were never valid to begin with, thereby mooting the determination of the choice-of-law provision's applicability.

H. ILLEGALITY

1. Limitations on Liability under Cal. Civ.Code § 1668

79. The Legal Remedies Provisions limit the type and amount of damages that class members are entitled to recover from AT & T.[8] Plaintiffs contend that the plain language of

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[8] Section 4 of the CSA is titled "*Limitations on Liability*" and states as follows:

> *THIS SECTION DESCRIBES THE FULL EXTENT OF OUR RESPONSIBILITY FOR ANY CLAIMS YOU MAKE FOR DAMAGES CAUSED BY THE FAILURE OF THE SERVICES, OR ANY OTHER CLAIMS IN CONNECTION WITH THE SERVICES OR THIS AGREEMENT.*
>
> *IF OUR NEGLIGENCE CAUSES DAMAGE TO PERSON OR PROPERTY, WE WILL BE LIABLE FOR NO MORE THAN THE AMOUNT OF DIRECT DAMAGES TO THE PERSON OR PROPERTY. FOR ANY OTHER CLAIM, WE WILL NOT BE LIABLE FOR MORE THAN THE AMOUNT OF OUR CHARGES FOR THE SERVICES DURING THE AFFECTED PERIOD. FOR ALL CLAIMS, WE WILL NOT BE LIABLE FOR INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO, LOST PROFITS OR REVENUE OR INCREASED COSTS OF OPERATION. WE ALSO WILL NOT BE LIABLE FOR PUNITIVE, RELIANCE OR SPECIAL DAMAGES. THESE LIMITATIONS APPLY EVEN IF THE DAMAGES WERE FORESEEABLE OR WE WERE TOLD THEY WERE POSSIBLE, AND THEY APPLY WHETHER THE CLAIM IS BASED ON CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL OR EQUITABLE THEORY.*
>
> *WE WILL NOT BE LIABLE FOR ANY DAMAGES IF SERVICES ARE INTERRUPTED, OR THERE IS A PROBLEM WITH THE INTERCONNECTION OF OUR SERVICES WITH THE SERVICES OR EQUIPMENT OF SOME OTHER PARTY. THIS SECTION WILL CONTINUE TO APPLY AFTER THE AGREEMENT ENDS.*

Section 7(a) of the CSA also contains language limiting plaintiffs' liability, and states in part:

> *THE ARBITRATOR MAY NOT AWARD DAMAGES THAT ARE NOT EXPRESSLY AUTHORIZED BY THIS AGREEMENT AND MAY NOT AWARD PUNITIVE DAMAGES OR ATTORNEYS'*

these provisions sweeps broadly, extending to liability for both negligence and intentional conduct, and that AT & T impermissibly has limited its liability for claims other than negligence to the amount of charges for service during the affected period, and shielded itself from liability for punitive, reliance, special and consequential damages. As so construed, plaintiffs argue, the Legal Remedies Provisions violate Cal. Civ.Code § 1668, which provides:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of law.

80. In arguing that the Legal Remedies Provisions extend beyond claims for negligence, plaintiffs rely on a number of clauses, such as: "[t]his section describes the full extent of our responsibility for . . . any other claims in connection with the services or this agreement"; "[f]or any other claim, we will not be liable for . . ."; "[f]or all claims, we will not be liable for . . ."; and "[t]hese limitations . . . apply whether the claim is based on contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory." CSA § 4.

81. AT & T now contends that section 4 only applies to limitations on liability for negligent conduct.[9] AT & T argues

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FEES UNLESS SUCH DAMAGES ARE EXPRESSLY AUTHORIZED BY A STATUTE. YOU AND AT & T BOTH WAIVE ANY CLAIMS FOR AN AWARD OF DAMAGES THAT ARE EXCLUDED UNDER THIS AGREEMENT.

[9] During the preliminary injunction hearing, AT & T agreed that the Legal Remedies Provisions limit AT & T's liability for intentional misconduct. (Prelim. Inj. Tr. at 111, lns. 17-22.) AT & T now argues they do not. If AT & T is so uncertain over the meaning of one of the principal Legal Remedies Provisions, how can the class members be expected to have understood to what they were agreeing?

that the section was intended to distinguish between negligence claims involving damages to people or property and all other negligence claims, not all other claims. AT & T also argues that the ban on punitive damages in section 4 only applies to negligence claims, and that section 7(a), which states that "[t]he arbitrator . . . may not award punitive damages or attorneys' fees unless such damages are expressly authorized by a statute," governs claims for intentional misconduct. *Id.* § 7(a).[10] Finally, AT & T argues that the reference in section 4 to claims "based on contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory" was merely intended to apply to allegations of negligence dressed in other legal theories.[11]

82. AT & T's current interpretation of the liability limitations proves more than AT & T intends. If section 4 only applies to liability for negligent conduct, as AT & T contends, and the only other language in the entire CSA

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[10] While the inclusion of two punitive damages provisions may appear to support AT & T's argument, AT & T conceded that the punitive damages language in section 7(a) was placed there at the request of the AAA. (Prelim. Inj. Tr. at 115, lns. 1-11.) This explains its placement in Section 7(a), entitled "Dispute Resolution," and not in Section 4, entitled "Limitations of Liability," and explains its wording as a limitation on the arbitrator's authority, whereas the ban on punitive damages in Section 4 is worded as a limitation on AT & T's liability. The AAA must have read Section 4 the same way as I do—as a ban on punitive damages even in cases of intentional misconduct or statutory violation, if it requested the inclusion of the language that now appears in Section 7(a).

[11] Under AT & T's interpretation, only claims based on negligence, however pleaded, would be subject to arbitration because section 7(a)'s language mirrors that of section 4, stating that "any disputes arising out of or related to this Agreement (whether *based in contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory*) must be resolved by final and binding arbitration." CSA Section 7(a) (emphasis added). Yet AT & T has vigorously contended that all plaintiffs' claims, whether relating to intentional or negligent conduct, are subject to final and binding arbitration under the CSA.

relating to liability for other conduct states that "[t]he arbitrator may not award damages that are not expressly authorized by this agreement and may not award punitive damages or attorneys' fees unless such damages are expressly authorized by a statute," CSA § 7(a), then there exists no basis upon which an arbitrator could award compensatory damages if she finds intentional misconduct or statutory violations. Put another way, since an arbitrator cannot award damages not expressly authorized in the CSA, then she could not possibly award compensatory damages for intentional conduct because they are not provided for anywhere in the CSA. If, on the other hand, I were to accept plaintiffs' interpretation of section 4, there would at least exist a basis upon which an arbitrator could award compensatory damages for intentional conduct, albeit one unacceptably limited to the amount of charges for the customer's services during the affected period.

83. Neither interpretation passes muster under Civil Code Section 1668, which makes it illegal for a party to exempt itself from liability for most types of intentional or illegal misconduct. *See Farnham v. Superior Court,* 60 Cal.App.4th 69, 71, 70 Cal.Rptr.2d 85 (1997)("[C]ontractual releases of future liability for fraud and other intentional wrongs are invariably invalidated.").[12] The former has the effect of exempting AT & T from all liability for intentional conduct, something clearly prohibited under California law. *See McQuirk v. Donnelley,* 189 F.3d 793, 796-97 (9th Cir. 1999)("*Farnham* thus stands for the proposition that § 1668 invalidates the total release of future liability for intentional wrongs."); *Blankenheim v. E.F. Hutton & Co., Inc.,* 217 Cal. App.3d 1463, 1471-72, 266 Cal.Rptr. 593 (1990)("Under [§ 1668], a party may not contract away liability for fraudu-

[12] In view of this result, I do not consider whether there may be other instances in which the limitations on liability in the Legal Remedies Provisions would violate California law.

lent or intentional acts or for negligent violations of statutory law."); *Baker Pac. Corp. v. Suttles,* 220 Cal.App.3d 1148, 1154, 269 Cal.Rptr. 709 (1990)("[A] release from liability for fraud and intentional acts . . . on its face violates the public policy as set forth in Civil Code section 1668."). The latter impermissibly limits AT & T's liability for such intentional conduct as fraud. *See Klein v. Asgrow Seed Co.,* 246 Cal.App.2d 87, 100-01, 54 Cal.Rptr. 609 (1966) (agreement limiting the liability of the manufacturer to a refund of the price of the seed would violate Cal. Civ.Code § 1668). The limitations on liability are also contrary to the FCC's expectations that "complete detariffing would further the public interest by preventing carriers from unilaterally limiting their liability for damages." *Second Report and Order,* 11 F.C.C.R. 20,730, ¶ 55 (1996).

84. AT & T argues that notwithstanding the limiting language in section 7(a), an arbitrator would be allowed to award any relief for intentional conduct authorized by law. Although this may be true as to punitive damages and attorneys' fees,[13] as to any other damages, it disregards basic arbitration law. While arbitrators, in fashioning an appropriate choice of remedies, "may base their decision upon broad principles of justice and equity," they may not do so if they are "specifically restricted by the agreement to following legal rules . . . ." *Advanced Micro Devices v. Intel Corp.,* 9 Cal.4th 362, 374-75, 36 Cal.Rptr.2d 581, 885 P.2d 994 (1994). *See also United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)("[A]n arbitrator is confined to interpretation and application of the [governing] agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet . . . [w]hen

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[13] This assumes that an award under Cal. Civ.Code § 3294, which authorizes punitive damages in cases of oppression, fraud or malice, is one "expressly authorized by a statute."

the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."); *Moncharsh v. Heily & Blase,* 3 Cal.4th 1, 8, 10 Cal.Rptr.2d 183, 832 P.2d 899 (1992) (quoting *O'Malley v. Petroleum Maintenance Co.,* 48 Cal.2d 107, 110, 308 P.2d 9 (1957)) ("The powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission."). Here, the Legal Remedies Provisions expressly provide that "the arbitrator shall be bound by and strictly enforce the terms of this Agreement and may not limit, expand or otherwise modify its terms." CSA § 7(a). They further prohibit the arbitrator from awarding damages "not expressly authorized by this Agreement . . . ." *Id.*

85. A solution proposed by AT & T, that it would notify the AAA of the true meaning of the Legal Remedies Provisions, does not save the Provisions for a number of reasons. It would require the court to ignore a violation of law based on a representation in court that AT & T would not seek to take advantage of the violation. It is not at all clear how the AAA would respond or how this representation would work out in practice. It would be very unfair to the class, since in deciding whether to pursue a claim, the class would assume they were limited by the Legal Remedies Provisions and not by some side agreement between AT & T and the AAA.

86. Finally, AT & T argues that the Legal Remedies Provisions should not be read literally for to do so would produce "nonsensical results." (Def.'s First Am. Trial Br. at 23.) That is one of the risks AT & T assumed when it undertook in a few sentences to rewrite a substantial body of law governing its relations with its customers. AT & T is simply asking the court to do too much. The plain language of section 4 cannot be read in the manner that AT & T proposes. Even if AT & T intended section 4 to only apply to negligent conduct, and even if it intended an arbitrator to be able to award any relief authorized by law, it did not clearly

provide for this in the CSA. I do not have the authority to rewrite or reform the legal services provisions so that they do not lead to absurd results. *See Armendariz v. Foundation Health Psychcare Services,* 24 Cal.4th 83, 125, 99 Cal.Rptr. 2d 745, 6 P.3d 669 (2000) (citing *Kolani v. Gluska,* 64 Cal.App.4th 402, 407-08, 75 Cal.Rptr.2d 257 (1998))(the power to reform is limited to instances in which parties make mistakes, not to correct illegal provisions).

2. Waiver of Statutory Rights under the CLRA

87. The Legal Remedies Provisions also violate public policy by seeking to impose an effective waiver of the statutory rights provided to class members under the CLRA. "[P]arties agreeing to arbitrate statutory claims must be deemed to 'consent to abide by the substantive and remedial provisions of the statute. Otherwise, a party would not be able to fully vindicate [his or her] statutory cause of action in the arbitral forum.'" *Armendariz,* 24 Cal.4th at 101, 99 Cal.Rptr. 2d 745, 6 P.3d 669 (quoting *Broughton v. Cigna Healthplans,* 21 Cal.4th 1066, 1087, 90 Cal.Rptr. 2d 334, 988 P.2d 67 (1999))(omitting citations). *See also Gilmer,* 500 U.S. at 28, 111 S.Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)) ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). Any waiver of the statutory rights provided for under the CLRA "shall be unenforceable and void." Cal. Civ.Code § 1751.[14]

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[14] In view of the decision herein, I do not consider whether the Legal Remedies Provisions could constitute the effective waiver of other statutory rights guaranteed to the plaintiff class. The California Supreme Court has already ruled that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the [California Fair Employment and Housing Act]." *Armendariz,* 24 Cal.4th at 101, 99 Cal.Rptr.2d 745, 6 P.3d 669.

88. The CSA's ban on class actions and its imposition of a two year limitations period on the filing of claims are the most apparent efforts to effect a waiver of the class members' statutory rights under the CLRA. Section 1781(a) of the CLRA states:

> Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

Cal. Civ.Code § 1780(a). The CSA, however, provides for resolution of disputes through arbitration before a neutral arbitrator "instead of . . . through a class action," CSA § 7, and states that "no dispute may be . . . resolved on a class-wide basis." *Id.* § 7(a). The CSA therefore violates plaintiffs' rights to bring a class action under the CLRA and is "contrary to public policy and . . . unenforceable and void." Cal. Civ.Code § 1751.

89. Similarly, section 1783 of the CLRA states:

> Any action brought under the specific provisions of Section 1770 shall be commenced not more than three years from the date of the commission of such method, act, or practice.

Id. § 1783. The two year limitation clause in the CSA, *see* CSA § 7(b), expressly waives this three year statute of limitations, and is therefore unenforceable and void under the CLRA's anti-waiver provision. *See* Cal. Civ.Code § 1751.

I. THE UNCONSCIONABILITY OF THE CSA

90. Under California law, unconscionability has both a procedural and substantive element. *See Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Blake v. Ecker,* 93 Cal.App.4th 728, 742, 113 Cal.Rptr.2d 422 (2001); *Flores v. Transamerica Homefirst,* 93 Cal.App.4th 846, 853,

113 Cal.Rptr.2d 376 (2001); *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114 (1982). The procedural element focuses on "oppression," which "arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice," or "surprise," which "involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Flores*, 93 Cal.App.4th at 853, 113 Cal.Rptr.2d 376. *See also Armendariz*, 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Blake*, 93 Cal.App.4th at 742, 113 Cal.Rptr.2d 422; *California Grocers Ass'n*, 22 Cal.App.4th at 213, 27 Cal. Rptr.2d 396. Put another way, "procedural unconscionability occurs when a party has experienced surprise or oppression due to unequal bargaining power." *Blake*, 93 Cal.App.4th at 742, 113 Cal.Rptr.2d 422. The substantive element of unconscionability "traditionally involves contract terms that are so one-sided as to 'shock the conscience' or that impose harsh or oppressive terms." *Id.* (citing *Armendariz*, 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669). It focuses on "the effects of the contractual terms and whether they are overly harsh or one-sided." *Flores*, 93 Cal.App.4th at 853, 113 Cal.Rptr.2d 376 (citing *A & M Produce Co.*, 135 Cal.App.3d at 487, 186 Cal.Rptr. 114; *Armendariz*, 24 Cal.4th at 114, 118-19, 99 Cal.Rptr.2d 745, 6 P.3d 669). "Substantive unconscionability . . . has . . . been described as . . . the absence of any justification for that result, or 'that a contractual term is substantially suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner.'" *Allan v. Snow Summit, Inc.*, 51 Cal.App.4th 1358, 1377, 59 Cal.Rptr.2d 813 (1996) (quoting *A & M Produce Co.*, 135 Cal.App.3d at 487, 186 Cal.Rptr. 114). Procedural and substantive unconscionability must both be present in order for a court to find an unconscionable contract or contract provision. *See Armendariz*, 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (quoting *Stirlen v.*

Supercuts, 51 Cal.App.4th 1519, 1533, 60 Cal.Rptr.2d 138 (1997)). However, the two elements can operate on a sliding scale: a greater finding of one absolves the need for an equal or greater finding of the other. *See id.; Blake,* 93 Cal.App.4th at 743, 113 Cal.Rptr.2d 422.

91. In *Armendariz,* the California Supreme Court concluded that the general state law of unconscionability could be applied to invalidate all or part of an employment arbitration agreement, notwithstanding the strong federal and state policy favoring arbitration as a means of dispute resolution. Citing the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, and the California Arbitration Act, Cal.Civ.Proc.Code § 1281, the Court stated that "arbitration agreements are valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract,* [and] may only be invalidated for the same reasons as other contracts." *Armendariz,* 24 Cal.4th at 98, 99 Cal.Rptr.2d 745, 6 P.3d 669 (emphasis added). *See also Doctor's Assoc. v. Casarotto,* 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (citations) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]."). Therefore, at least with respect to the FAA, an unconscionability analysis of the Legal Remedies Provisions for purposes of determining AT & T's liability under California consumer protection laws is consistent with, and envisioned by, federal law.

1. Procedural Unconscionability

92. An analysis of procedural unconscionability begins with an inquiry into whether the CSA is a contract of adhesion. *See Armendariz,* 24 Cal.4th at 113, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Flores,* 93 Cal.App.4th at 853, 113 Cal.Rptr.2d 376. A contract of adhesion is a standardized contract "imposed upon the subscribing party without an opportunity to negotiate the terms." *Flores,* 93 Cal.App.4th

at 853, 113 Cal.Rptr.2d 376. In the case at bar, it is undisputed that the CSA is a contract of adhesion. AT & T unquestionably had superior bargaining strength and presented the CSA as a pre-printed document with uniform language drafted and prepared entirely by AT & T. As discussed above, the terms and conditions of the CSA were imposed on the class members without an opportunity for negotiation, modification or waiver. *See supra* ¶¶ 34-36. In other words, the CSA was presented to the class members on a "take it or leave it" basis.

93. A determination that the CSA is a contract of adhesion, plaintiffs contend, is tantamount to a finding of procedural unconscionability. *See, e.g., Flores,* 93 Cal.App.4th at 853-54, 113 Cal.Rptr.2d 376 ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability . . . ."). *Accord Stirlen,* 51 Cal.App.4th at 1533, 60 Cal.Rptr.2d 138; *California Grocers Ass'n,* 22 Cal.App.4th at 214, 27 Cal.Rptr.2d 396. *But see Dean Witter Reynolds,* 211 Cal.App.3d at 769, 259 Cal.Rptr. 789 ("[W]e are not prepared to hold that [oppression and adhesiveness] are identical."). AT & T, on the other hand, contends that a finding of adhesion only begins the analysis of procedural unconscionability. Although the case law appears to favor plaintiffs' position that an adhesive contract is procedurally unconscionable, I do not need to base my finding of procedural unconscionability solely on the adhesive nature of the CSA because the elements of oppression and surprise are sufficiently present to satisfy the shifting standard present in a sliding scale analysis.

94. To avoid "oppression," there must be "a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services *free of the terms claimed to be unconscionable.*" *Dean Witter Reynolds,* 211 Cal.App.3d at 772, 259 Cal.Rptr. 789 (emphasis added). Here, the class members lack of a

meaningful choice with respect to the Legal Remedies Provisions satisfies the "oppression" prong of procedural unconscionability. Residential long distance carriers who service two-thirds of the California market all provide substantially similar dispute resolution provisions which include mandatory arbitration and limitations on damages.[15] Finding a carrier who did not contain such a provision was not easy. *See supra* ¶¶ 37-41. The obstacles were compounded by AT & T's response to those class members who complained about the unfairness of the arbitration provisions. AT & T representatives were instructed not to discuss arbitration, and class members would frequently be directed to a recording or written materials. A class member who specifically complained about the arbitration provision would be sent a written response which stated in part that "[a]ll of the other major long distance carriers have included an arbitration provision in their service agreements." (Pls.' Exs. 177, 186.) AT & T's characterization of the ease with which class members can switch carriers is also misleading. If a class member is dissatisfied with her legal remedies, she may be able to change her service, but she cannot change her choice of legal remedies once the problem that invokes those remedies has occurred. *See* CSA § 4 ("This section will continue to apply after the agreement ends."). Once the problem arises, a class member is locked into the Legal Remedies Provisions in the CSA.

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[15] Verizon, a carrier with 8.8% of the residential long distance market in California, does not require its customers to agree to binding arbitration. It is not clear how "meaningful" a choice Verizon is. A thorough review of Verizon's website revealed no information at all regarding its consumer service agreement, its limitations on liability or the fact that it does not impose on its customers mandatory, binding arbitration. Additionally, it is hard to believe that if AT & T were permitted to limit its legal liability and exposure to legal action, Verizon, submitting to the undisputedly highly competitive demands of the marketplace, would not adopt provisions similar to those of AT & T.

95. The CSA also possessed the "surprise" necessary for a finding of procedural unconscionability. The determination of whether the Legal Remedies Provisions were "hidden in a prolix printed form" loses its importance when AT & T's own research found that only 30% of its customers would actually read the entire CSA and 10% of its customers would not read it at all. AT & T's research also found that 1/4 of the class would not open the separate mailing. Plaintiffs introduced evidence that these numbers were even higher. Even more significant is the fact that a typical consumer did not expect to receive a new contract from AT & T, let alone one which conditioned acceptance on a negative option. Not only are these results consistent with AT & T's overall message of reassurance to its customers, they result directly from that message. Had AT & T wanted to minimize "surprise," it could have delivered a clearer message to its customers. It could have, among other things, advised its customers that the separate mailing contained a new contract, put a similar advisory on the envelope containing the billing mailing and otherwise been more candid and communicative about the limitations it was imposing on a consumer's legal rights and remedies. Instead, AT & T characterized the detariffing process as a non-event, thereby imposing on its customers the artificial notion that they would be unaffected by the changes resulting from detariffing. Under a sliding scale analysis, all this is enough to satisfy the procedural element of unconscionability, given the strong presence of substantive unconscionability in the CSA.

2. Substantive Unconscionability

96. As discussed above, to the extent the Legal Remedies Provisions attempt to limit the rights of class members under the CLRA, they are contrary to statute and public policy and are void. *See supra* ¶¶ 87-89. Plaintiffs also challenge the Provisions as substantively unconscionable. As discussed

above, substantive unconscionability focuses on the harshness and one-sidedness of a contract's terms and the effect of those terms. *See supra* ¶ 90.

97. Perhaps most significant are the limitations on liability in the Legal Remedies Provisions. For the same reasons they are illegal, they are also substantively unconscionable.

98. Plaintiffs strongly challenge the CSA's prohibition of class actions in non-CLRA cases. Case law and public policy embrace the importance of class actions as a vital instrumentality of consumer protection. The United States Supreme Court has detailed the substantial advantages a class action procedure may offer:

> [I]t may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise, [thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost . . . . [T]he financial incentive that class actions offer . . . is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights . . . . Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). *See also Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 860, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) ("One great advantage of class action treatment . . . is the opportunity to save the enormous transaction costs of piecemeal litigation . . . ."); *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) ("Class actions serve an important function in our system of civil justice."). The California Supreme Court is of the same view. *See Linder v. Thrifty Oil Co.,* 23 Cal.4th 429,

445, 97 Cal.Rptr.2d 179, 2 P.3d 27 (2000) ("[C]lass actions offer consumers a means of recovery for modest individual damages . . . ."); *Vasquez v. Superior Court,* 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) ("Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action . . . .").

99. As discussed above, the prohibition on class actions will prevent class members from effectively vindicating their rights in certain categories of claims, especially those involving practices applicable to all members of the class but as to which any consumer has so little at stake that she cannot be expected to pursue her claim. *See supra* ¶¶ 64-66, 71. This ban on class actions is exacerbated by many of the other restrictions in the Legal Remedies Provisions, such as the limitations on damages and the confidentiality provision.

100. The ban is effectively one-sided since it is hard to conceive of a class action suit that AT & T would file against its customers. And the only justification advanced for it, that it will limit AT & T's cost of litigation,[16] is insufficient to

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[16] AT & T has suggested that if its costs are lower, it can charge less. It presented no evidence that the Legal Remedies Provisions would produce lower charges. In fact, the FCC has concluded that "requiring nondominant interexchange carriers to conduct their businesses as do other businesses in unregulated markets will not substantially increase their costs." *Order on Reconsideration,* 12 F.C.C.R. 15,014, § 15. Nor am I prepared to make that assumption, since while lower costs can produce lower charges, they can also produce higher profits. In any event, the notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws. *See generally A & M Produce Co.,* 135 Cal.App.3d at 491-92, 186 Cal.Rptr. 114 (citing *Escola v. Coca Cola Bottling Co.,* 24 Cal.2d 453, 462, 150 P.2d 436 (1944) (Traynor, J., concurring); *Rodgers v. Kemper Constr. Co.,* 50 Cal.App.3d 608, 618, 124 Cal.Rptr. 143 (1975); Holmes, The Common Law 117 (1881))("From a social perspective, risk of loss is most appropriately borne by the party best able to prevent its occurrence.").

overcome numerous determinations by legislators and courts, noted above, that class action treatment offers the public a vehicle for vindicating legal rights when individual claims are not economically feasible. For all these reasons, the ban on class actions is substantively unconscionable.[17]

101. Plaintiffs next challenge the confidentiality provision of Section 7, which reads:

> Any arbitration shall remain confidential. Neither you nor AT & T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award.

CSA § 7(b).

102. Read literally, this provision is rather draconian. Once a claim enters arbitration a class member may not talk about the claim to anyone, except as may be required by law or to confirm or enforce an award. This serves to prevent, among many other examples, a class member from talking to family members about a problem that may involve them all, a class member from talking to a neighbor or co-worker that may have a similar problem or a class member from complaining to an elected official about the fairness of the arbitration.

103. The implications of such secrecy to society are troubling. Among many others, they mean that if consumers obtain determinations that a particular AT & T practice is unlawful, they are prohibited from alerting other consumers. Since the AAA does not require the arbitrator to state reasons for the award and does not provide a public record of arbitrator rulings, this confidentiality provision means that a contract that affects seven million Californians will be

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[17] AT & T argues that plaintiffs still have the ability to obtain classwide relief from the FCC. However, the FCC is not a forum in which one or a group of class members can effectively vindicate many of their rights in a variety of contexts. *See supra* ¶¶ 68-71.

interpreted largely without public scrutiny. This puts AT & T in a vastly superior legal posture since as a party to every arbitration it will know every result and be able to guide itself and take legal positions accordingly, while each class member will have to operate in isolation and largely in the dark.[18]

104. AT & T seeks to distance itself from the dark side of its confidentiality provision in several ways. First it argues that the provision should not be read literally since it was not intended to prohibit many of the sorts of communications mentioned above. One AT & T witness even testified that he was familiar with confidentiality agreements of the sort that often apply to expert witnesses and he never thought they were meant to prevent his talking to friends and co-workers. The problem is that for purposes of determining its legality, I cannot assume that the class will not read the provision literally but will disregard its plain words as this expert would.

105. AT & T next claims that the harsh results discussed above are all mitigated by the phrase "except as may be required by law." Read literally, AT & T's argument fails since none of the communications mentioned above are "required by law."[19] Alternatively, AT & T contends that this provision merely mirrors the confidentiality provision in the

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[18] *See* Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce,* Ohio St. J. on Disp. Resol. 769, 786-87 (2000) ("The institutional repeat player . . . will quickly have access to a variety of arbitral awards . . . that can be used . . . to argue for or against any position the repeat player chooses to take in each arbitration. The one-shot player has no such arsenal of arbitral awards to choose from to cite as precedent for her position on interpreting the contract.").

[19] There appears to be little law interpreting this phrase. In this court, it appears frequently in confidentiality provisions in settlement agreements and is generally interpreted to mean that the confidential terms can only be disclosed in response to a court order or other specific legal obligation.

FCC rules for arbitrations conducted under the aegis of the FCC. *See* 47 C.F.R. § 1.18(b) (2001). The difficulty with AT & T's position is that the provision in the ADRA, the statute upon which the FCC rule relies, permits claimants to disclose much information about the arbitration, including any information that originates with the claimant. *See* 5 U.S.C. § 574(b) (1996 & Supp.2001). It does not require disclosure. A disclosure permitted by the ADRA is not one "required by law." A contrary conclusion is certainly not one I would expect the ordinary consumer to reach. And as mild as the ADRA confidentiality provision is, it is entirely voluntary, *See id.* § 575(a)(1)("Arbitration may be used as an alternative means of dispute resolution whenever all parties consent."), and can never be imposed in a contract, precisely what AT & T is attempting to do here. *See id.* § 575(a)(3)("An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.").

106. At trial, AT & T contended that the purposes of this provision were to protect consumer privacy, such as in a dispute about phone charges to a pornographic service, and to discourage copycat lawsuits. Whatever merit there is in this position, the scope of AT & T's provision is far too broad. All reasonable expectations about privacy can be resolved by entering into a confidentiality agreement tailored to a specific claim. And, the confidentiality provision extends to all "copycat lawsuits," even those which are meritorious and where there is a public purpose to be served by alerting consumers to a particular problem. This provision is so one-sided, oppressive and devoid of justification as to be substantively unconscionable.

107. Plaintiffs also argue that the two year limitation period in the Legal Remedies Provisions is substantively unconscionable. Whereas this clause may be illegal as applied to plaintiffs' statutory rights under the CLRA, it is not substantively unconscionable when applied to non-statutory

claims. *See Soltani v. Western & Southern Life Ins. Co.*, 258 F.3d 1038, 1043-45 (9th Cir.2001) ("Many California cases have upheld contractual shortening of statutes of limitations in different types of contracts . . . ."); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir.1995) ("California permits contracting parties to agree upon a shorter limitations period for bringing an action than prescribed by statute, so long as the time allowed is reasonable."). The United States Supreme Court has also upheld such clauses, finding that:

> In the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations provided that the shorter period itself shall be a reasonable period.

Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 608, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947).

108. Finally, plaintiffs contend that the Legal Remedies Provisions are unconscionable because of the financial obstacles they place in the path of a class member. The Legal Remedies Provisions apply to both statutory and non-statutory claims. Most of the cases which have considered the financial implications of mandatory arbitration schemes have done so in the context of determining whether they prevent a claimant from effectively vindicating statutory rights. *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000); *Williams v. Cigna Financial Advisors*, 197 F.3d 752, 763-64 (5th Cir.1999), *cert. denied*, 529 U.S. 1099, 120 S.Ct. 1833, 146 L.Ed.2d 777 (2000); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir.1998)(Cox, J., concurring); *Luong v. Circuit City Stores, Inc.*, 2001 WL 35317, at *6 (C.D.Cal. Mar. 28, 2001). It is hard to conceive of how an adhesive contractual provision which prevents someone from effectively vindicating her non-statutory legal rights would not be substantively unconscionable, so I will apply

one analysis to both statutory and non-statutory claims. *See generally Sosa v. Paulos,* 924 P.2d 357, 362 (Utah 1996).

109. In *Green Tree Financial Corp.,* the United States Supreme Court recognized that:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum.

531 U.S. at 90, 121 S.Ct. 513. Because there was no evidence in the record regarding the costs of arbitration, the Supreme Court refused to invalidate the arbitration agreement based on speculation that the plaintiff would be "saddled with prohibitive costs." *Id.* at 91, 121 S.Ct. 513.

110. Here, the Legal Remedies Provisions provide that if a class member has a claim for under $1000 and is willing to have the dispute resolved by a review of documents, the class member will pay a $20 filing fee and AT & T will pay all other fees and costs associated with the arbitration. However, it is unlikely there will be many such arbitrations. *See supra* ¶ 62. Arbitration involving any disputes over $10,000, or arbitration that is conducted in person, is governed by the AAA's Commercial Rules. The CSA provides no other information about the costs of arbitration other than mailing and Internet addresses at which a class member can obtain further information about AAA rules and fees.

111. Plaintiffs introduced substantial evidence of the costs of arbitration, much of it gleaned from discovery obtained from AAA and much of it not available to class members when they received the CSA.[20] Based on plaintiffs' showing, it is apparent that in a number of situations, large arbitration

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[20] A search of the AAA website adr.org disclosed AAA's fees but no information about typical arbitrators' fees. A search of the AT & T website identified in the Legal Remedies Provisions yielded no information about any fees or costs.

costs will preclude class members from effectively vindicating their legal rights. In *Armendariz,* the California Supreme Court stated:

> Our holding in *California Teachers Assn.* serves to confirm the principle inherent in *Cole* that statutory or constitutional rights may be transgressed as much by the imposition of undue costs as by outright denial . . . . Accordingly . . . the arbitration agreement or arbitration process cannot generally require the [plaintiff] to bear any *type* of expense that [she] would not be required to bear if [she] were free to bring the action in court.

Armendariz, 24 Cal.4th at 109-111, 99 Cal.Rptr.2d 745, 6 P.3d 669 (emphasis in original). For example, a class member who believes she has been the victim of discrimination, of illegal credit reporting practices, or of "slamming," and who seeks $25,000 in damages, would have to pay, for a two day arbitration, a $750 filing fee as soon as she files her claim, (J. Ex. 16-25), and might have to deposit approximately $1900 in arbitrator's fees (based on half of the $1899 average daily rate of arbitrator compensation in Northern California), (J. Ex. 16-19), for a total of $2650 before the arbitration begins. If her claim sought $100,000 and the arbitration was scheduled for four days, the initial filing fee would be $1250, (J. Ex. 16-25), there would be an extra case service fee of $750, (*see id.*), and there could be an arbitrator's fee deposit of $3800. Thus, a class member's potential cost before arbitration begins would be $5800. Filing that suit in a court, which she supports with her taxes, would generally cost her under $200 in California. Having to advance such substantial sums will deter many litigants from proceeding. *See, e.g., Phillips v. Associates Home Equity Serv.,* 2001 WL 1159216, at *5 (N.D.Ill. Sept.28, 2001) (refusing to compel arbitration of TILA claims arising out of a $72,900 mortgage when claimant was required to pay over $4000 in fees).

112. The arbitrator's authority to alter the allocation of the costs of arbitration at the conclusion of the case does little to mitigate the cost of "buying into" arbitration. *See id.* Neither does the AAA's policy of occasionally deferring some of its, but not the arbitrator's, fees in cases of extreme hardship. *See supra* ¶¶ 59-61. Unlike other companies who have recognized this problem by providing for the advancement of plaintiffs' costs or the capping of such costs in their arbitration agreements, thereby resulting in court approval, *see, e.g., Luong,* 2001 WL 935317, at *5 (upholding arbitration agreement which required defendant to advance a majority of the arbitration's costs and imposed a limit on plaintiff's payment of defendant's costs should defendant prevail), AT & T has chosen not to limit the plaintiffs' costs of arbitration in a meaningful fashion.

113. The inhibiting effects of imposing AAA fees on a class member are magnified by the other limitations in the Legal Remedies Provisions. Because AT & T has severely limited the damages a successful plaintiff may obtain and has prohibited the joinder of claims and the use of class actions, it has eliminated other incentives to litigants and potential counsel which might mitigate the harsh effects of the arbitration fees. As noted above, the undisputed testimony was that AT & T has created a legal environment in which even seemingly meritorious claims, such as those which have been successfully prosecuted against AT & T and have resulted in substantial recoveries, would no longer be prosecuted. *See supra* ¶¶ 63-66.

114. Having found that certain of the Legal Remedies Provisions are illegal and unconscionable under state law, I now turn to the severability of the Legal Remedies Provisions. The CSA contains a severability clause which states "[i]f any part of this Agreement is found invalid, the rest of the Agreement will remain valid and enforceable." CSA § 8(e). It further states that "[i]f any portion of this Dispute

Resolution Section is determined to be unenforceable, then the remainder shall be given full force and effect." *Id.* § 7(a). In *Armendariz,* after examining the basic principles inherent in Cal. Civ.Code § 1599 and the case law of illegal contracts, the Supreme Court applied the doctrine of severability to a finding of unconscionability of the arbitration agreement before it:

> If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.

Armendariz, 24 Cal.4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.[21] *See also Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court,* 17 Cal.4th 119, 138, 70 Cal.Rptr.2d 304, 949 P.2d 1 (1998). In *Armendariz,* the Court found that the only effective way to sever the multiple unlawful provisions that permeated the arbitration agreement would be to reform the contract by augmenting its terms. Because a court lacks the power to do this, it refused to enforce the entire agreement. *See Armendariz,* 24 Cal.4th at 124-25, 99 Cal.Rptr.2d 745, 6 P.3d 669.

115. The Legal Remedies Provisions contain many unlawful or unconscionable clauses. While some, such as the ban on class actions, are easily severable, others, such as the limitations on liability and the allocation of arbitration costs,

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[21] Although the California Supreme Court was addressing a § 1670.5 defense of unconscionability, this rationale would apply equally to a § 1770(a)(19) action for unconscionability under the CLRA, given the aforementioned statutory scheme and body of case law providing for an affirmative cause of action for unconscionability and the resulting remedy of voiding those provisions found to be unconscionable under the CLRA. *See supra* ¶¶ 74-77.

can only be remedied by substantially rewriting the contract. This is not a proper court function. *See id.* at 125, 99 Cal. Rptr.2d 745, 6 P.3d 669 (citing *Kolani v. Gluska,* 64 Cal.App.4th at 407-08, 75 Cal.Rptr.2d 257)(the power to reform is limited to instances in which parties make mistakes, not to correct illegal provisions). In addition, these provisions often intertwine to advance AT & T's overriding purpose of deterring litigation. As in *Armendariz,* the presence of "[s]uch multiple defects indicate a systematic effort to impose arbitration on [a class member] not simply as an alternative to litigation, but as an inferior forum that works to [AT & T's] advantage." *Id.* at 124, 99 Cal.Rptr.2d 745, 6 P.3d 669. Under the circumstances I conclude that the Legal Remedies Provisions as a whole are so permeated with unconscionability and illegality that they cannot be saved or reformed. However, the CSA does have a valid legal purpose of governing the relationship between AT & T and the class members. Inclusion of the Legal Remedies Provisions is not essential to the CSA, since in their absence the parties' legal rights are governed by existing law. Therefore I find that the Legal Remedies Provisions are severable from the CSA.

J. PREEMPTION UNDER THE FCA

116. AT & T primarily defends against plaintiffs' state law claims by arguing that the FCA preempts any application of state contract and consumer protection laws to the CSA's rates, terms and conditions.[22] According to AT & T, sections 201(b) and 202 of the FCA exclusively govern the rates, terms and conditions of interstate long distance telephone service. AT & T argues that the Legal Remedies Provisions constitute such rates, terms and conditions specifically referred to in the FCA, and therefore any challenge to their

[22] The Attorneys General of eleven states have filed an amicus curiae brief contending that the FCA does not preempt the state consumer protection laws at issue here.

lawfulness or reasonableness should be decided under federal law. Because plaintiffs have focused their arguments on state law and not under federal law, AT & T argues that it should prevail if I decide that the CSA's terms are governed by federal law.

117. The FCA can preempt plaintiffs' state law claims expressly through its plain language, or impliedly. Express preemption occurs when a federal statute expressly directs that state law be ousted to some degree from a certain field. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Here both parties agree that the terms of the FCA do not expressly preempt state consumer protection laws. AT & T argues, however, that the FCA impliedly preempts state law. As the Supreme Court recently explained,

> [A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, . . . or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (internal citations omitted). *See also Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984) (conflict preemption); *Campbell v. Hussey,* 368 U.S. 297, 300-02, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961) (field preemption). Under any preemption analysis, the party arguing for preemption must provide clear evidence of Congress' intent to preempt state law because "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of

Congress." *Medtronic v. Lohr,* 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (citations omitted). This is crucial if a party is to satisfy the heavy burden of overcoming the "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action." *Id. See also Jones,* 430 U.S. at 525, 97 S.Ct. 1305 ("This [presumption] provides assurance that 'the federal-state balance,' will not be disturbed unintentionally by Congress or unnecessarily by the courts.") (citation omitted). To support its position, AT & T relies on the case law interpreting the filed rate doctrine as applied to the Interstate Commerce Act ("ICA") and the FCA and the FCC's detariffing order and the circumstances surrounding its implementation.[23]

118. AT & T relies heavily on the proposition, first discussed in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907) and recently reiterated in *AT & T v. Central Office Telephone, Inc.,* 524 U.S. 214, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998), that the filed rate requirements of both the ICA and the FCA implicitly preempt any state law claims challenging the rates, terms and conditions listed in those filed tariffs. In *Texas & Pac. Ry.,* the Supreme Court concluded that a shipper seeking damages under the ICA based upon the alleged unreasonableness of rates charged by a common carrier must do so through the Interstate Commerce Commission, not the courts, because it alone "is vested with power originally to entertain proceedings for the alteration of an established schedule . . . ." *Texas & Pac. Ry.,* 204 U.S. at 448, 27 S.Ct. 350. Over 90

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[23] Reduced to its essence, AT & T argues that in passing the FCA, Congress intended to preempt state law to ensure telephone "service on uniform rates, terms, and conditions throughout the nation." (Def.'s Trial Br. at 14, ln. 8.) It is ironic that AT & T makes this argument in an effort to impose mandatory arbitration since it is hard to see how the goal of uniformity is advanced if the rates, terms, and conditions of service are being judged by arbitrators making unreported and largely unreviewable decisions.

years later, the Court applied the "filed rate" doctrine to bar breach of contract and tortious interference claims relating to a service governed by a tariff filed with the FCC. *See AT & T v. Central Office Telephone, Inc.*, 524 U.S. at 226, 118 S.Ct. 1956. The Court emphasized that the purpose of the filed rate doctrine was to prevent carriers from engaging in unjust discrimination and from providing undue preferences to some customers. "It is that antidiscriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.'". *See AT & T v. Central Office Telephone, Inc.*, 524 U.S. at 223, 118 S.Ct. 1956 (quoting *MCI Telecommunications Corp. v. AT & T*, 512 U.S. 218, 229, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)).

119. In light of the clear purpose of the filed rate doctrine, AT & T's reliance on these cases is misplaced. In interpreting Congress' intent, the Supreme Court was concerned with the potential for carriers charging discriminatory rates to, or imposing discriminatory terms on, their customers, not with whether their customers were able to resolve disputes before a court or an arbitrator, or whether their customers were able to file a class action on the other matters here in dispute.

120. Defendant's cases are distinguishable on a number of other grounds as well, the most obvious being that the Court decided them both before the FCC exercised its forbearance authority under the Telecommunications Act of 1996 to end the practice of setting rates, terms and conditions through tariffs filed with the FCC. Both decisions explicitly and undisputably addressed rates and charges that had already been filed as tariffs. *See Texas & Pac. Ry.*, 204 U.S. at 434, 27 S.Ct. 350; *AT & T v. Central Office Telephone, Inc.*, 524 U.S. at 225, 118 S.Ct. 1956 (services at issue "pertain[ed] to subjects that [were] *specifically addressed* by the filed tariff . . . .")(emphasis in original). In marked contrast, the Legal Remedies Provisions of the CSA have never been filed with the FCC as part of a tariff and could not be filed after detariffing.

121. This does not mean that the rates, terms and conditions of residential long distance telephone service are no longer governed by Sections 201(b) and 202 of the FCA. Instead, it simply means that the issues of contract formation, illegality and unconscionability presented here are not questions relating to whether carriers will be unjustly discriminatory as to the rates, terms and conditions of service such that there is a need for implied preemption.[24]

122. This is consistent with the position taken by the FCC in response to a petition for reconsideration filed by AT & T and other carriers in which AT & T sought to resolve what it thought was an ambiguity in the Commission's position on whether the FCA would continue to govern the reasonableness of rates, terms and conditions of interstate service in a detariffed environment. The FCC responded by stating that:

> The [FCA] continues to govern determinations as to whether rates, terms and conditions for interstate . . . services are just and reasonable, and are not unjustly or unreasonably discriminatory . . . .

Order on Reconsideration, 12 F.C.C.R. 15,014 at ¶ 77. The FCC went on to emphasize that "the [FCA] does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment." *Id.* As evidenced by the legislative history and the series of notices and orders surrounding the detariffing decision. Congress and the FCC consistently manifested the intent to allow state law to govern consumer rights and the inevitable formation of a new legal relationship between AT & T and its customers in the wake of a detariffed environment. For example, the FCC repeatedly stated that the absence of filed tariffs and the abolition of the filed rate doctrine would result in a "legal relationship between carriers and customers . . . more closely

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[24] The precise scope of FCA preemption in a detariffed environment will be defined as rates, terms or conditions of service are challenged.

resembl[ing] the legal relationship between service providers and customers in an unregulated environment." *Second Report and Order,* 11 F.C.C.R. 20,730 at ¶ 55. *See also supra* ¶¶ 8-9. After its detariffing order was implemented on August 1, 2001, the FCC informed customers on its website that although companies no longer have to file tariffs with the FCC, customers will be "protected by the full range of state laws, including those governing contract, consumer protection, and deceptive practices . . ." and "state contract law determines what constitutes an agreement between you and your long distance company." (*Supra* ¶ 11.) Against this backdrop, I cannot conclude that the legality of the Legal Remedies Provisions in a service contract that would not have existed prior to detariffing should now be decided as if detariffing, the event that gave rise to the CSA in the first place, had never occurred.

CONCLUSION

This lawsuit is not about arbitration. If all AT & T had done was to move customer disputes that survive its informal resolution process from the courts to arbitration, its actions would likely have been sanctioned by the state and federal policies favoring arbitration. While that is what it suggested it was doing to its customers, it was actually doing much more; it was actually rewriting substantially the legal landscape on which its customers must contend. Aware that the vast majority of service related disputes would be resolved informally, AT & T sought to shield itself from liability in the remaining disputes by imposing Legal Remedies Provisions that eliminate class actions, sharply curtail damages in cases of misrepresentation, fraud, and other intentional torts, cloak the arbitration process with secrecy and place significant financial hurdles in the path of a potential litigant. It is not just that AT & T wants to litigate in the forum of its choice—arbitration; it is that AT & T

wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable and must be enjoined.

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ATTACHMENT NO. 3

Frequently Asked Questions

T sending me this Services Agreement?
er long distance companies currently file "tariffs"—the legal word for the terms and conditions under which ervices to our customers—with the FCC. As a result of recent FCC rulings, AT&T will no longer file tariffs for These terms and conditions will now be provided in this AT&T Consumer Services Agreement. The Agreement tate-to-state and international long distance services beginning August 1, 2001.

rvices Agreement affect my AT&T service, and do I need to take any action?
Consumer Services Agreement will have no impact on the service you receive, the price you pay for it, or change your service. You accept the terms and conditions simply by continuing to use or pay for any AT&T or international consumer long distance service. Please retain this Agreement for future reference.

T Consumer Services Agreement apply to other AT&T services, such as AT&T WorldNet® Service?
rnet services, AT&T Wireless Services, and AT&T video services are covered by different agreements. In greement does not cover AT&T local services or AT&T in-state long distance services.

&T Service Guides and where can I find them?
Guides describe each of the many available AT&T services, as well as any special terms and conditions that a separate AT&T Service Guide for each of our calling plans, detailing the plan's rates, monthly fees, and other find the AT&T Service Guides online at www.att.com/servicesguide/home no later than July 9, 2001, or write to Box 944050, Maitland, FL 32794-4050, to request specific Service Guides. You must include your telephone me of your local phone company, and the name and billing address (including ZIP code) that appears on your o request a written copy of the Service Guides that apply to the products and services that you are enrolled 888 288-4099.*

r most popular long distance plans?
ose a basic rate plan or one of our calling plans for their state-to-state and international calls from home. generally have higher per-minute rates but have no monthly plan charges. Most calling plans have a lower but charge a monthly fee or minimum. As examples, the following rates were in effect as of April 1, 2001: te® 7¢ Plan offers a rate of 7¢ per minute for state-to-state calling from home with a monthly fee of $5.95. te calls away from home, customers can obtain the AT&T Calling Card and pay only 25¢ per minute with a if they select the AT&T One Rate® Calling Card Plan. If they choose not to sign up for this card plan, rates 89¢ per minute plus applicable service charges. Generally, consumers can save with our calling plans if they g distance calls. You can check a recent phone bill to determine if you're on one of our calling plans and the ying.

ruling cover in-state services?
laws and public utility or public service commission rules govern in-state telecommunications services. ected by the FCC proceedings. In-state services will continue to be provided pursuant to state tariffs, where

state-to-state and international long distance calls does the AT&T Consumer Services ver?
will apply to nearly all types of state-to-state and international long distance calls. These include AT&T Distance, AT&T Calling Card, AT&T Easy Reach 809® calls; AT&T collect, person-to-person, billed-to-third- operator-assisted calls; commercial credit card calls, and your local exchange company calling card calls &T Network. Calls made by dialing 10-10-345 will not be covered by this Agreement.

g in this Agreement that is different from the terms and conditions filed with the FCC?
notable changes in particular:
tion. Any disputes that may arise between AT&T and customers that cannot be resolved informally ved through binding arbitration (or through small claims court, if you choose). In arbitration, disputes by an objective third party rather than a jury. Arbitration is a quicker and more convenient way to settle he hassle and cost of a court case. It's in addition to the remedies consumers have through federal and

price increases. Effective August 1, 2001, AT&T will notify you of price increases for direct-dialed long home that are covered under your AT&T calling plans. We will also notify you of price increases for state- under the basic schedule calling plans. This information will also be available in a recorded announcement mber, 1 888 288-4099.* Announcements will be updated with future price increase information on the nth day of each month. In addition, all price increases for AT&T state-to-state and international consumer be posted on our Web site, www.att.com/servicesguide/home, before the increases go into effect.

77 288-4775
ech disabilities, 1 800 833-3333.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[File May 16, 2002]

No.02-15416
D.C. No. CV-01-2969-BZ
Northern California

DARCY TING, an individual and on behalf of all others similarly situated; et al.,
Plaintiffs-Appellees,

v.

AT&T, a New York corporation,
Defendant-Appellant.

ORDER

Before: FERNANDEZ and THOMAS, Circuit Judges

Appellant's motion for partial stay of the permanent injunction entered on February 22, 2002, is granted.

Appellant's motion to expedite the appeal is granted. The previously established briefing schedule shall remain in effect. The parties shall file the briefs by express mail for overnight delivery. Because any extension of time will likely necessitate recalendaring, Ninth Circuit Rule 31-2.2(a) shall not apply to this appeal and written motions for extensions of them in which to file the briefs will not be granted absent a showing of extraordinary and compelling circumstances.

The Clerk shall calendar this case to be heard in Pasadena, California, the week of August 5-9, 2002.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C01-2969 BZ ADR

DARCY TING, individually and on behalf of all others similarly situated, and CONSUMER ACTION, a non-profit membership organization, both as private attorneys general,
Plaintiffs,

v.

AT&T, a New York Corporation,
Defendant.

FINAL JUDGMENT

This action came on for trial before the Court on November 13, 2001. The Court entered Findings of Fact and Conclusions of Law on January 15, 2002 and a Permanent Injunction of February 22, 2002. IT IS THEREFORE ORDERED, ADJUDGED, and DECREED as follows:

1. Judgment on the complaint is entered in favor of the plaintiff class.

2. AT&T is permanently enjoined from enforcing the Legal Remedies Provisions of the Consumer Services Agreement against the plaintiff class, as more particularly outlined in the Permanent Injunction, which is made part of this judgment.

3. As the prevailing party, plaintiffs are entitled to an award of attorneys' fees and costs.

4. The Court retains jurisdiction to enforce or modify the Permanent Injunction and to consider a motion for award of attorneys' fees and costs.

Dated: February 22, 2002

/s/ Bernard Zimmerman
Bernard Zimmerman
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C01-2969 BZ ADR

DARCY TING, individually and on behalf of all others similarly situated, and CONSUMER ACTION, a non-profit membership organization, both as private attorneys general,
Plaintiffs,

v.

AT&T, a New York Corporation,
Defendant.

PERMANENT INJUNCTION

Having entered Findings of Fact and Conclusions of Law on January 15, 2002, IT IS HEREBY ORDERED as follows:

1. Defendant AT&T Corporation, and its agents, servants, employees, representatives, subsidiaries, assigns and all those acting in concert with it or at its direction or with knowledge of this Permanent Injunction, (collectively "AT&T"), is permanently enjoined from enforcing the provisions set forth in sections 4 and 7 (the "Legal Remedies Provisions") of the Consumer Services Agreement which became effective August 1, 2001 (the "CSA"), against its California customers of long distance service.

2. Having found that the Legal Remedies Provisions of the CSA are invalid, unconscionable, unenforceable and void, they are severed from the remainder of the CSA, which shall remain in effect with respect to AT&T's California long distance customers.

3. Any statute of limitations applicable to any claim or dispute of any California customer of AT&T long distance

services against AT&T which arose on or after August 1, 2001 is hereby extended and/or tolled from August 1, 2001 through February 25, 2002.

4. AT&T shall provide forthwith to the plaintiff class previously certified written notice of this Permanent Injunction and its effect on their rights and remedies under the CSA in the form attached to this Permanent Injunction. This notice may be mailed to class members separately or may be included in their monthly bill. In either event, the notice shall be in an envelope which prominently contains the information on the form of envelope attached hereto.

5. AT&T shall provide appropriate links, in a prominent position on the AT&T Consumer Home Page of this website (located at *www.attconsumer.com*), to a notice of the Permanent Injunction and the court-ordered Notice of Class Action Judgment. AT&T shall also provide appropriate links, positioned adjacent to this notice, to a copy of this Permanent Injunction and the Findings of Fact and Conclusions of Law.

6. AT&T shall provide oral and written notice of this Permanent Injunction and its effect on the rights and remedies of its California long distance customers under the CSA to its California long distance customers who contact AT&T through any AT&T automated response system or customer service representative with a question about their bill or account. AT&T shall provide to class counsel for comment a script of the automated response and a copy of the written guidance provided to customer service representatives.

7. The Court retains jurisdiction to enforce or modify the terms of this Permanent Injunction.

DATED: February 22, 2002

/s/ Bernard Zimmerman
Bernard Zimmerman
United States Magistrate Judge

NOTICE OF CLASS ACTION JUDGMENT

A Federal Court has ruled that you are not bound by Sections 4 and 7 of the AT&T Consumer Services Agreement sent to you within the last year

AT&T sent you a new agreement within the past year called the "AT&T Consumer Services Agreement" (the "CSA") setting the terms under which AT&T would provide you with state-to-state and international long distance service. Following trial in a class action lawsuit entitled *Darcy Ting et al. v. AT&T Corp*, Case No. C 01-2969 BZ, a federal court issued a ruling on January 15, 2002 and a permanent injunction on February 22, 2002 that affect any California residents who: *are currently AT&T long distance customers in California or were AT&T long distance customers in California at any time on or after August 1, 2001, and subject to the CSA previously sent to you (the "Class").*

Specifically, the Court found that two sections of the CSA, Section 4 and Section 7, are unenforceable and void. Section 4, called "Limitations of Liability," limits the amount and type of damages that you may recover against AT&T in case of a dispute regarding your AT&T service under the CSA. Section 7, called "Dispute Resolution," limits your rights and remedies in a dispute with AT&T regarding your AT&T service by prohibiting class actions, imposing an overbroad confidentiality requirement, limiting the time you have to file some claims and requiring you to pay excessive costs for mandatory arbitration. The Court entered an order against AT&T finding that these two sections violated California consumer protection laws and prohibiting AT&T from enforcing these sections against its California long distance customers.

AT&T has appealed the order. While AT&T's appeal is pending, if you have a dispute against AT&T, you are not

bound by Section 4 and Section 7 of the CSA you received prior to February 25, 2002. You may file or join a class action lawsuit against AT&T, and the time limits within which you must file a lawsuit against AT&T are set by statute and not the CSA. You remain free to bring an eligible claim to small claims court or to a state or federal agency. You may also contact AT&T directly to resolve any dispute or to ask questions regarding your AT&T long distance service by calling the customer service number on your bill.

Please note that all of the other terms of the CSA apply and remain the same, and your AT&T service will not be interrupted or changed.

If you are part of the Class, you are represented by the Sturdevant Law Firm, San Francisco, California, (415) 477-2410 and the Trial Lawyers for Public Justice, Washington, D.C., (202) 797-8600. AT&T is represented by Sidley, Austin, Brown & Wood, Los Angeles, California, (213) 896-6000.

You can get a copy of the Court's ruling, the permanent injunction or the final judgment by visiting *www.attconsumer.com*. All legal documents filed in this action may be viewed at the public access terminal at the intake counter at the office of the Clerk of the Court, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102 or at the court's other two divisional offices. All legal documents may also be retrieved online at a cost of $.07 per page by using a *PACER* account. *PACER* is the Federal Judiciary's electronic public access mechanism. Anyone may obtain a *PACER* account by calling *800.676.6856* or by visiting the *PACER* website at *pacer.psc.uscourts.gov*. *PLEASE DO NOT CONTACT THE COURT OR THE CLERK OF THE COURT.* By Order of the United States District Court for the Northern District of California, Honorable Bernard Zimmerman, United States Magistrate Judge.

1-888-288-4099
www.attconsumer.com

Notice of Court Judgment: You are not bound by Sections 4 and 7 of the AT&T Consumer Services Agreement sent to you within the last year.

(Back of Envelope above)

(Front of Envelope below)

Ting v. AT&T
P.O. Box 00000
City, ST 00000-0000

Court-ordered notice:
Part of your long distance agreement with AT&T is void.

AT&T Customer
23 Anywhere Street
Anytown, ST 12345-1234

APPENDIX F

47 U.S.C. § 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one- year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

(June 19, 1934, c. 652, Title I, § 10, as added Feb. 8, 1996, Pub.L. 104-104, Title IV, § 401, 110 Stat. 128.)

47 U.S.C. § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request

therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

(June 19, 1934, c. 652, Title II, § 201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.)

47 U.S.C. § 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

(June 19, 1934, c. 652, Title II, § 202, 48 Stat. 1070; Sept. 13, 1960, Pub.L. 86-751, 74 Stat. 888; Dec. 19, 1989, Pub.L. 101-239, Title III, § 3002(a), 103 Stat. 2131.)

47 U.S.C. § 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself

and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in

accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

(June 19, 1934, c. 652, Title II, § 203, 48 Stat. 1070; Aug. 4, 1976, Pub.L. 94-376, § 1, 90 Stat. 1080; Dec. 19, 1989, Pub.L. 101-239, Title III, § 3002(b), 103 Stat. 2131; Sept. 28, 1990, Pub.L. 101-396, § 7, 104 Stat. 850.)

47 U.S.C. § 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to

the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or

practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

(June 19, 1934, c. 652, Title II, § 204, 48 Stat. 1071; Aug. 4, 1976, Pub.L. 94-376, § 2, 90 Stat. 1080; Nov. 3, 1988, Pub.L. 100-594, § 8(b), 102 Stat. 3023; Oct. 27, 1992, Pub.L. 102-538, Title II, § 203, 106 Stat. 3542; Feb. 8, 1996, Pub.L. 104-104, Title IV, § 402(b)(1)(A), 110 Stat. 129.)

47 U.S.C. § 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made

under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

(June 19, 1934, c. 652, Title II, § 205, 48 Stat. 1072; Dec. 19, 1989, Pub.L. 101-239, Title III, § 3002(c), 103 Stat. 2131.)

47 U.S.C. § 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

(June 19, 1934, c. 652, Title II, § 206, 48 Stat. 1072.)

47 U.S.C. § 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

(June 19, 1934, c. 652, Title II, § 207, 48 Stat. 1073.)

47 U.S.C. § 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

(June 19, 1934, c. 652, Title II, § 208, 48 Stat. 1073; Nov. 3, 1996, Pub.L. 104-104, Title IV, § 402(b)(1)(A), 110 Stat. 3023; Feb. 8, 1996, Pub.L. 104-104, Title IV, § 402(b)(1)(B), 110 Stat. 129.)

47 U.S.C. § 254. Universal service

* * * *

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

* * * *

(June 19, 1934, c. 652, Title II, § 254, as added Feb. 8, 1996, Pub.L. 104-104, Title I, § 101(a), 110 Stat. 71; and amended Sept. 30, 1996, Pub.L. 104-208, Div. A, Title I, § 101(e) [Title VII, § 709(a)(8)], 110 Stat. 3009-313; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(4) [Div. B, Title XVII, §§ 1721(a) to (f), 1732], 114 Stat. 2763, 2763A-343 to 2763A-350; as amended Jan. 8, 2002, Pub.L. 107-110, Title X, § 1076(hh), 115 Stat. 2094.)

Supreme Court, U.S.
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No. 02-1521

IN THE

Supreme Court of the United States

AT&T CORP.,
Petitioners,

v.

DARCY TING, An Individual
And On Behalf of All Others Similarly Situated, And
CONSUMER ACTION, A Non-Profit Membership Organization,
Both as Private Attorneys General,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED

Does the Federal Communications Act preempt the application of generally applicable state contract and consumer protection laws to the terms of a de-tariffed long distance carrier's proposed contracts with consumers, even when it is proven that those contract terms would deprive consumers of any effective remedy in the civil justice system for many illegal, unfair or deceptive acts the carrier might commit?

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit seeks to prevent AT&T from unilaterally imposing on its long distance customers unconscionable contract terms designed to eliminate their rights. Prior to August 1, 2001, long distance carriers were not required to form contracts with their customers, because the terms of long distance service were governed by tariffs filed with the Federal Communications Commission ("FCC"). When long distance service was deregulated, however, the FCC ordered long distance carriers to enter into contracts with their customers effective August 1, 2001. Accordingly, AT&T drafted the Consumer Services Agreement (the "Original CSA"), and sent it to AT&T customers in May and June of 2001. The evidence at trial proved – and AT&T does not appeal this finding in its Petition – that the company purposefully tailored the language of both the cover letter and the CSA so that customers would not read them.

The supposed goal of the Original CSA was to require AT&T's customers to submit all claims too large for small claims court to binding arbitration. Instead of creating a contract that would have legally achieved that goal under California laws applicable to all contracts, however, AT&T drafted the Dispute Resolution Provisions of the Original CSA to (a) sharply limit the remedies available to consumers even in

cases of intentional wrongdoing by, among other things, banning punitive damages and remedies provided by state consumer protection statutes; (b) force its customers to obey draconian secrecy provisions; (c) impose prohibitive costs upon many consumers pursuing arbitration; and (d) prohibit its customers from participating in class actions against it.

Plaintiffs maintained throughout this case that these provisions were procedurally and substantively unconscionable, and that they violated several state consumer protection statutes. Following a full trial, the district court agreed and enjoined their enforcement. Based upon an extensive evidentiary record, the district court issued detailed findings and concluded that the Original CSA would have denied AT&T's customers any meaningful means of redress for many valid claims that they might have under the state's consumer protection laws. On appeal, the Ninth Circuit affirmed the declaration that these four provisions were unconscionable, although that Court reversed the trial court with respect to one of the two statutory claims, finding that California's Consumer Legal Remedies Act was preempted by the Federal Arbitration Act ("FAA").[1]

A few weeks after the issuance of the comprehensive trial court decision below, AT&T significantly re-wrote the CSA ("the Revised CSA"). Under the Revised CSA,

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[1] Although it had waived this argument in the trial court, AT&T argued to the Ninth Circuit that California's contract law of unconscionability was also preempted by the FAA. The Ninth Circuit disagreed, and AT&T has not appealed the decision on this issue in its Petition to this Court. AT&T also argued unsuccessfully below that the Original CSA was not unconscionable under California law because it would not deny its customers the ability effectively to vindicate their rights. AT&T has also failed to present this issue in its petition.

consumers are able to obtain punitive damages and other statutory remedies for any intentional wrongdoing, consumers are not bound by any secrecy provisions unless they choose to be so bound after a dispute arises, and AT&T will bear nearly all the costs of arbitration for all consumer claims below $75,000. Also, within a few weeks of the trial court's decision, the American Arbitration Association significantly re-wrote its rules to shift far more of the costs of arbitration from consumers to businesses.

AT&T argued in the trial court and in the Ninth Circuit that the Federal Communications Act ("FCA") preempts all of the plaintiffs' claims in this case. Both courts rejected this argument. In its Petition, AT&T argues that this Court should grant *certiorari* because the Ninth Circuit's decision on the question of FCA preemption in this case conflicts with the decision in *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). As this opposition will show, the distinctions between *Boomer* and this case do not justify a grant of *certiorari*.

First, the divergences between these cases is not sufficient to justify this Court's jurisdiction because the cases involved very different contracts. While this case involved the Original CSA, *Boomer* involved a challenge to the Revised CSA. This difference is extremely important for several reasons. While plaintiffs only raised claims under California state law, at least two provisions of the Original CSA that were significantly altered in the Revised CSA violated not only state law, but the FCA as well. Since federal and state law on these points are in accord, there can be no implied conflict between state law and federal law – and thus no implied conflict preemption of state law – on those issues. Moreover, under applicable state law, a finding that these two provisions were unconscionable would justify striking the entire Dispute

Resolution Provisions of the Original CSA. Accordingly, even if the Ninth Circuit erred in its ruling that the FCA does not preempt California state law with respect to the Original CSA's ban on class actions, that error would not change the outcome in this case.

Second, the supposed conflict between *Boomer* and this case is greatly exaggerated by AT&T because the appeals courts in these two cases shared many precepts, and only disagreed about fairly narrow aspects of how these applied in the two cases. In addition, several of the differences in the outcomes of the two cases may be traced to differences in the factual records upon which the respective courts premised their reasoning.

Third, facts that are unique to this case render it a poor vehicle upon which to make broad pronouncements of law. As noted above, the district court made findings of fact that the Original CSA would undermine and eviscerate the ability of AT&T's customers to effectively vindicate their rights under the state consumer protection statutes. This is extremely significant, because several provisions of the FCA, as amended in 1996, explicitly save and rely upon state consumer protection statutes. Accordingly, the unusual facts of this case – certain terms in the Original CSA would have undermined the ability of consumers to obtain remedies under any and all state contract and consumer protection laws – raise legal issues unlikely to surface in many other cases.

Fourth, it is premature for this Court to address any fissure that may exist between these cases. This case and *Boomer* are the only Court of Appeals opinions addressing the extent of FCA preemption of state law since the FCC deregulated long distance service. There is significant value in letting the law on this question further develop and percolate.

Boomer demonstrates that rushing to decide this issue before the underlying regulatory scheme has stabilized can lead to errors and confusion. In *Boomer*, the Seventh Circuit decided the case on an unusually expedited basis. The court failed to consider an extremely important FCC decision issued only a few weeks prior to that decision that flatly contradicts many of the premises underlying the court's opinion.

On the merits, AT&T argues that, even if its conduct and the contract provisions in the Original CSA were illegal under California law, AT&T cannot be prevented from stripping consumers of their statutory rights and remedies because California's contract formation and consumer protection laws (and all other states' similar contract and consumer protection laws) are preempted by the FCA. AT&T's argument is wrong.

AT&T ignores the historic sea-change brought about by the recognition of both Congress and the FCC that long-distance service is no longer a monopoly and that the proper response to an era of widespread competition was to eliminate the reliance upon uniform tariffs that carried the weight of law and instead rely upon market forces (which include the normal backdrop of state commercial laws that apply to all competitive markets). AT&T's interpretation requires a tortured reading of all of the decisions interpreting and applying the filed rate doctrine as if they could have been decided just as easily under other provisions of the FCA.

STATEMENT OF THE CASE

I. FACTS ABOUT THIS LAWSUIT

The district court's 74 page opinion exhaustively describes the facts of this case. Petitioner's Appendix ("App.") 44a-109a. Plaintiffs will not replicate that discussion here. Nonetheless, some of the key facts need to be highlighted.

Under California law, contract terms will be found to be unconscionable and therefore unenforceable if they are both formed in a manner that is "procedurally unconscionable" and if they contain terms sufficiently one-sided, unfair and unreasonable to be "substantively unconscionable." App. 35a-38a, 84a-86a. The district court found that the Original CSA was procedurally unconscionable because it was a contract of adhesion and it was communicated to AT&T's customers in a manner that ensured that most of them would be "surprised" to learn of its terms. App. 86a-89a. The trial included extensive testimony and documentary evidence demonstrating that AT&T intentionally informed its customers about the Original CSA in a manner that guaranteed that few of them would notice the challenged terms. "AT&T characterized the [creation of the Original CSA] as a non-event," for example, "thereby imposing on its customers the artificial notion that they would be unaffected by the changes resulting from [the Original CSA]." App. 89a. In one in-house document, an AT&T official said that the mailing containing the Original CSA should be crafted so that it was not a "call to action" for customers. App. 55a. AT&T "downplayed" the Original CSA. *Id.* AT&T designed the envelope that contained the Original CSA so that it would look like "junk mail," App. 57a, and its marketing studies showed that many class members would not even open the mailing. App. 56a. The cover letter for the

Original CSA contained a single bolded message telling consumers that they did not need to do anything, and AT&T's own studies revealed that after reading that sentence most people would stop reading the mailing and throw it out without learning of the Original CSA's terms. App. 55a.

The district court found, and the Ninth Circuit agreed, that four features of the Original CSA were substantively unconscionable.[2] First, by its terms, section 4 of the Original CSA barred consumers from receiving punitive and other statutorily-provided damages even if AT&T committed intentional wrongful acts. AT&T asserts in its Petition that it had intended that this provision"carry forward" the liability limitations of its tariff, and that these limitations applied only to negligence claims but not claims for intentional wrongdoing. Pet. at 11. As the district court below found, however, in a lengthy discussion based upon the actual language of this provision, and in a conclusion that AT&T does not appeal in its Petition, the provision in the Original CSA went far beyond the earlier tariff. Under the plain language of the provision, the liability limitations applied not merely to claims for negligence, but also to "any other claim," and applied "whether the claim is based on contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory." App. 77a-83a, 90a. The Ninth Circuit did not need to address this holding, as AT&T only appealed the district court's refusal to rewrite that section. App. 30a, n.13.

Second, the Original CSA included a sweeping confidentiality provision making secret and requiring secrecy

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[2] AT&T challenged this determination below, but did not renew that challenge in its Petition to this Court.

about all facts concerning any dispute in arbitration. App. 92a. The district court concluded that this provision was "one-sided, oppressive, and devoid of justification ...." App. 94a. The court noted (and AT&T does not appeal this finding) that the secrecy provision would put AT&T "in a vastly superior legal posture" in litigation with its customers "since as a party to every arbitration it will know every result and be able to guide itself accordingly, while each class member will have to operate in isolation and largely in the dark." App. 93a. The Ninth Circuit affirmed the holding that this provision was unconscionable. App. 42a.

Third, after reviewing extensive evidence about the magnitude of the costs that consumers would bear under the Original CSA, App. 62a-66a, 95a-99a, the district court concluded that "in a number of situations, large arbitration costs will preclude class members from effectively vindicating their legal rights." App. 96a-97a. Again, the Court of Appeals affirmed the holding that the provisions of the Original CSA imposing prohibitive costs upon AT&T's customers were unconscionable. App. 40a-41a.

Fourth, the Original CSA prohibited AT&T's customers from bringing or taking part in class actions against the company. Prior to the Original CSA taking effect, consumers had successfully prosecuted a number of class actions against long distance phone carriers. App. 66a-67a. In one case, AT&T paid 100% of the class members' damages, App. 67a, and in another case a class recovered $88 million from another long distance carrier. App. 67a. The parties here stipulated in the district court that none of the lawyers in these earlier cases could have brought those cases on an individual basis, whether in court or arbitration. App. 67a-68a. Based on this and other substantial evidence in the record, the district court found that

"the prohibition on class action litigation [in the CSA] functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, would serve to shield AT&T from liability even in cases where it has violated the law." App. 68a. The Ninth Circuit affirmed this finding as well. App. 39a.

Based on the foregoing, the district court concluded that "AT&T sought to shield itself from liability .... AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in [the arbitral] forum." App. 105a-106a. Accordingly, the district court found the challenged provisions of the Original CSA to be unconscionable and illegal, and enjoined them. Following California's normal rules for contract provisions containing "multiple defects," the district court struck all of the Original CSA's "Legal Remedies Provisions." App. 100a. The Ninth Circuit also affirmed on this point. App. 38a, n.13.

II. THE COMMUNICATIONS ACT AND THE DETARIFFING EFFORT UNDERLYING AT&T'S AUGUST 2001 EFFORT TO IMPOSE THE CSA.

Understanding the preemption issues posed by AT&T requires discussion of the principal terms of the FCA bearing upon preemption, and an awareness of how the law of FCA preemption has radically changed as a consequence of the growth of competition and deregulation.

When long distance telephone service first became widespread in this nation, it was a natural monopoly. Congress recognized that if this monopoly was not regulated, the long distance company would have enormous power that could be used to give some parties or geographical areas a great

advantage over others. A central feature of the Interstate Commerce Act, which was the forerunner to the FCA, was to protect the nation from possible abuses of this monopoly power by ensuring that all phone service was provided to all people on the same terms. Accordingly, from the early 1900s on, the terms of phone service were not governed by contract principles as an agreement between two parties, but by the principle that the terms themselves became a species of law. *See Western Union Telegraph Co. v. Esteve Brothers*, 256 U.S. 566, 571 (1921) ("The Act of 1920 introduced a new principle into the legal relations of the telegraph companies with their patrons.... The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed.").

While no language in the Interstate Commerce Act itself gave rise to a hard rule of uniformity, that gap was soon filled. When the FCA was first enacted, the legal mechanism that was developed to ensure uniformity was incorporated into § 203. This section provides that common carriers shall file schedules with the FCC setting out their rates, as well as "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203. These schedules became known as tariffs. For many decades, long distance telephone service was governed by these tariffs, which were filed with and approved by the FCC. The preemptive force of § 203 was absolute in its scope. "If approved, the tariff exclusively controlled the rights and liabilities of the parties as a matter of law." App. 46a. The reason for the absolute preemptive force of these tariffs was simple: "A tariff filed with a federal agency is the equivalent of a federal regulation." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998).

The absolute preemptive scope of § 203 was embodied in "the filed rate doctrine," which was the "central principle of the regulatory scheme for interstate telecommunications carriers." *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 187 (D.D.C. 2001) (citation omitted). The entire focus of this Court's most recent decision dealing with FCA preemption revolves around § 203 and the filed rate doctrine. *See AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998).

In 1996, Congress deregulated long distance service. It did this by amending the FCA to permit the FCC to forbear from enforcing § 203, and thus to eliminate the filed rate doctrine. As the Court of Appeals below noted, Congress envisioned the 1996 Amendments as "a dramatic break with the past that would revolutionize long-distance service by greatly decreasing the scope of the FCC's role." App. at 26a. Accordingly, acting pursuant to the 1996 Amendments, 47 U.S.C. § 160(a), the FCC ended the system of tariffs. 11 F.C.C. Rcd. 20,730 (1996). In the place of tariffs, the FCC required that the same backdrop of laws, "incentives and rewards" that govern companies in other fields would apply to carriers. 11 FCC Rcd. 20,730 at ¶ 4.

AT&T fiercely fought the detariffing movement that ended that doctrine.[3] In this case, however, AT&T argues that § 203 and the filed rate doctrine were always mere procedural devices, and that they were superfluous to the Act's actual preemptive force. AT&T now asserts that an absolute requirement of uniformity, and a sweeping preemptive force,

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[3] AT&T had unsuccessfully opposed complete detarriffing, hoping it could continue to "limit [its] liability through tariff provisions." *Interstate Interexchange Marketplace*, 12 FCC Rcd. 15,014 at ¶ 8 (1997).

arises from two different provisions of the FCA – 47 U.S.C. § 201 and § 202.

FCA § 201 provides that the terms of long-distance service must be "just and reasonable." 47 U.S.C. § 201. AT&T argues that this section means that state laws of contract formation and breach, and consumer protection laws generally, may never render any term of a long distance carrier's contract unconscionable.

Section 202 of the FCA provides that long-distance carriers may not "give any undue or unreasonable preference" to any particular set of customers. 47 U.S.C. § 202. AT&T contends that plaintiffs' claims are preempted by § 202 because application of California law to AT&T's conduct in California constitutes "unjust or unreasonable discrimination" that gives California customers an "undue or unreasonable preference or advantage."

Unlike the absolute language of § 203, §§ 201 and 202 use heavily qualified language. The terms of these provisions do not speak of complete uniformity, but only bar "unreasonable" preferences and "unreasonable" terms. In the wake of deregulation, these terms cannot be read in the absolute manner in which § 203 was consistently interpreted for decades.

The withdrawal of FCC regulation was not meant to herald an era of lawlessness in the telecommunications industry. Instead, the framers of the 1996 Amendments intended that state law would play an important role in preserving consumer protections. *See* App. 48a (citing comments in legislative history about the crucial role of state consumer protection laws). The FCC concurred. In its statements relating to detariffing, the FCC said that it would henceforth rely upon the

marketplace to ensure that §§ 201 and 202 were enforced. *E.g., Second Report and Order*, 11 F.C.C.R. 20,730, ¶ 4. When the FCC has used the term "marketplace" in similar contexts, it has always contemplated that term as including state contract and consumer protection laws. In *In the Matter of Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19,898 (1999), for example, the FCC agreed with several carriers that the 1996 Act established a preference for "the competitive forces of the marketplace, rather than governmental regulation," but cautioned that it did not agree with the Petitioner's arguments "to the extent that they imply such preference for competition over regulation results in a general exemption for the [mobile phone] industry from the neutral application of state contractual or consumer fraud laws." 14 F.C.C.R. at 19,903. Accordingly, the FCC's statements on detariffing spoke of the centrality of state consumer protection and contract laws. *See, e.g., Second Report and Order*, 11 FCC Rcd 20,730 at 20,753 (1996).

AT&T reacted with alarm to the FCC's position that, in the detariffed environment, long distance carriers would be subject to state consumer protection laws. It filed a petition requesting that the FCC announce that it was going to continue to enforce § 201 and § 202 as they related to the terms of long distance service. AT&T also requested that the FCC make an express statement that this continued enforcement would "exclusively" govern the terms of service. AT&T did not get what it wanted. In its substance, as the district court found, the FCC "granted in part and denied in part AT&T's petition. . . ." App. 50a. The FCC's Order on Reconsideration provided in relevant part:

> [T]he [FCA] continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are

> just and reasonable, and are not unjustly or unreasonably discriminatory. [However,] *we note that the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.*

12 FCC Rcd 15,014 at ¶ 77 (emphasis added).

Thus, while the FCC clarified that it would continue to regulate the "rates, terms and conditions" of service, it made equally clear that issues of *contract formation and breach* would now be governed by state law and that consumers would now have remedies under state consumer protection and contract laws as to issues regarding the legal relations between the carrier and customer. The order did not state that any body of state law was preempted. The FCC subsequently stated unequivocally that consumers "are protected by the full range of state laws, including those governing . . . consumer protection, and deceptive practices." App. 51a.

In the detariffed environment, the FCC has made clear that carriers no longer must offer uniform contract terms to all consumers. Indeed, the FCC has made clear that carriers are now free under §§ 201 and 202 to offer different terms to different consumers, and the agency relies upon the marketplace to ensure that these distinctions are not unreasonable or unjust. In *Orloff v. Vodafone Airtouch Licenses*, 17 F.C.C.R. 8987 (2002), for example, the FCC permitted a carrier to negotiate

separate and different agreements with each of its consumers. The FCC held that these contract variations did not violate section 202(a) of the FCA because market forces would not permit unreasonable discrimination. 17 F.C.C.R. at 8996-97. The agency also treated §§ 201 and 202 in the same manner. *See Orloff*, 17 F.C.C.R. at 8999 (rejecting Orloff's § 201(b) claim simply for "the reasons discussed above [in the dismissal of his § 202(a) and (b) claims]").[4]

Through this Petition, AT&T asks this Court to adopt positions that it was unable to convince the FCC to adopt.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WARRANTING REVIEW BY THIS COURT.

A. The Significant Factual Differences Between this Case and *Boomer* Weigh Heavily Against Review.

AT&T's principal argument that this Court should grant *certiorari* relies upon the differing perspectives of the Ninth

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[4] The *Orloff* case arose in the cellular phone context. While it is true that the cellular phone companies were never subject to any tariff, the FCC's statements relating to §§ 201 and 202 in that context apply with equal force in the long-distance context. In its decisions to detariff long-distance service, the FCC made clear that its goal was to create a system that would rely upon the same market policing forces for long-distance service as governed cellular phones. *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 F.C.C.R. 7141, 7158 (1996). In other words, the cellular phone context is the model for the world of detariffed long distance service, and the FCC's interpretations of §§ 201 and 202 in cases involving cellular companies are completely applicable here.

Circuit in this case and the Seventh Circuit in the *Boomer* case. In fact, much of the difference between these decisions may reflect the great differences in the contracts that the two courts considered.

As set forth above, the Ninth Circuit affirmed the order enjoining the Dispute Resolution Provisions of the Original CSA based upon the unconscionability of four provisions of the Original CSA: (1) the limitation on liability even for intentional wrongdoing; (2) the broad secrecy provision; (3) the prohibitive costs of arbitration; and (4) the prohibition on class actions. As set forth on the Statement of the Case, however, AT&T re-wrote the first three of these provisions immediately after the trial in this case. The Seventh Circuit noted that it was addressing only the Revised CSA. *See Boomer*, 309 F.3d at 410 ("AT&T later amended the CSA to further reduce the potential arbitration expense. . . .")[5] Accordingly, the version of the CSA that was before the Seventh Circuit in *Boomer* was very different from the version at issue here.

The differences between the contracts at issue in this case and *Boomer* are particularly significant for two reasons. First, two of the contract provisions at issue in this case were illegal under the FCA. As noted above, the courts below found (and AT&T does not challenge this determination in its Petition) that the Original CSA would bar consumers from receiving any consequential or punitive damages, even in the case of intentional wrongdoing. Under authorities acknowledged by AT&T, however, any provision that would

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[5] The Seventh Circuit did not address the limitations on liability in cases of intentional wrongdoing that had been contained in § 4 of the Original CSA, or the secrecy provision of the Original CSA, further demonstrating that *Boomer* involved a different set of issues.

immunize AT&T from intentional wrongdoing has been conclusively determined to violate the FCA. *See, e.g., In the Matter of AT&T*, 76 F.C.C.2d 195, 197 n. 5 (1980) ("liability for willful misconduct is borne by the shareholder [of AT&T]"). In addition, the CSA contained a sweeping secrecy provision. That provision greatly exceeded the limited and discrete confidentiality provision of the FCA, which provides limited confidentiality only with the consent of the consumer, 5 U.S.C. § 574(b), and AT&T effectively recognized this fact when it re-wrote the provision in the Revised CSA to track that statutory language.

The point here is not that plaintiffs are advancing or have previously advanced in this case any cause of action under the FCA – they consistently disclaimed such an intention, and this case was brought solely on state law grounds.[6] Instead, the point is that AT&T cannot claim that state laws applied to these provisions of the Original CSA are preempted by the FCA, when those same provisions that were held to violate state law also violate the FCA. Where both bodies of law would reach the same result (invalidating the provision), there is no conflict between them.

The differences between the contracts are also particularly significant for a second reason. Under California's

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[6] AT&T states in its Petition that it is "undisputed" that the Original CSA complies with the FCA. Pet. at 1. This is simply not true. It is true that plaintiffs did not bring their case under the FCA, but they never agreed that the Original CSA complied with the FCA. Indeed, plaintiffs pointed to the plain language of AT&T's provision to disprove AT&T's claims that the limitation on liability provision was not "intended" to restrict damages for wrongful misconduct (and therefore supposedly complied with the FCA), and the courts below agreed with plaintiffs on this point.

law of unconscionability, where an arbitration clause contains multiple illegal provisions, that is grounds for a court to strike the entire arbitration clause. *Armendariz v. Foundation Health Psychare Services*, 6 P.3d 669, 775 (Cal. 2000) (presence of "multiple defects" is grounds for refusing to sever individual unconscionable provisions, but instead strike the entire arbitration provision). In this case, AT&T argued below that under California law, the court should merely strike any unconscionable terms but leave the remainder of the Original CSA's Legal Remedies Provisions in place. The district court below rejected AT&T's argument, however, and held that the permeation of multiple unconscionable provisions required excising all of the Original CSA's Legal Remedies Provisions. App. 99a-100a. The Court of Appeals affirmed. App. 43a. Accordingly, the presence of the two unconscionable provisions that also violate the FCA would be sufficient to justify the entire decision below, even with respect to the other contract terms which AT&T claims are permitted under the FCA. When an alternate, exclusively state-law ground exists for affirming the court of appeals, this Court should deny certiorari. *E.g.*, *South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40 (9th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990).

The significance of any legal split between the decision below and *Boomer* is also muted in light of the vastly different factual records before the courts. One of the central holdings of *Boomer* was that the FCA preempted any state law that might apply to the Revised CSA because the application of state law would increase AT&T's costs. *Boomer*, 309 F.3d at 419 This is, self-evidently, an empirical question of fact, not a legal issue. The *Boomer* court does not indicate what *admissible evidence*, if any, existed in the record to support its conclusion on the point. *Id.* Instead, the *Boomer* court appears to imagine that this factual question is one upon which a court might

speculate as to the answer. In this case, by contrast, after the same issue was raised by AT&T, and after evidence was introduced by each side and the witnesses were cross-examined, the district court specifically found that AT&T had *not* demonstrated that the Original CSA would reduce its costs. App. 91a. The district court's factual finding was not surprising, in light of the extensive evidence of the substantial transaction costs that would be created by the mechanisms employed in the Original CSA. *E.g.*, App. 65a (the average arbitrator in Northern California charges $1,899 for a day of hearings). As the district court below noted, App. 91a, the FCC also has explicitly announced a finding of fact that requiring compliance with state contract and consumer protection laws will not increase the costs of long distance carriers. "[R]equiring nondominant interexchange carriers to conduct their businesses as do other businesses in unregulated markets will not substantially increase their costs." 12 FCC Rcd. 15,014 at ¶ 15.[7] The expert agency's determination on this point deserves substantial deference. A divergence among the Courts of Appeals that is rooted in differing factual conclusions drawn from different factual records does not justify the exercise of this Court's jurisdiction.

AT&T also exaggerates the alleged conflict between the opinion below and *Boomer*. In fact, the appeals courts in both

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[7] As set forth in the Statement of the Case, the trial court below also found that the unconscionable terms of Original CSA (such as the provision stripping remedies even for intentional wrongdoing) would prevent many consumers with valid claims under the state's consumer protection statutes from vindicating their rights. The Seventh Circuit, by contrast, did not consider this factual issue with respect to the Revised CSA. This factual difference is significant with respect to both FCA preemption and the supposed split between this case and *Boomer*, as this Opposition will establish below in the discussion of the prematurity issue.

cases share many core precepts. Like the Ninth Circuit, the *Boomer* court found no express or field preemption. *Boomer*, 309 F.3d at 417, 424. Like the Ninth Circuit, the *Boomer* court agreed that "state law may determine whether a contract has been formed," *id.* at 423, although it disagreed with the Ninth Circuit's view that this rule extends to the contract law doctrine of unconscionability. Like the Ninth Circuit, the *Boomer* court also agreed that "following detariffing, there appears to be some role for state law." *Id.* at 424. While the courts disagreed upon the precise contours of the role for state law, and some of the implications to be drawn from these principles, there is also much in common in their approaches. In this blurred setting, a grant of *certiorari* is not appropriate. *See Miroyan v. U.S.*, 439 U.S. 1338, 1339 (1978) ("[w]hile there is undoubtedly a difference of approach between the Circuits on [the application of the Fourth Amendment to tracking beepers], I am not sure that there is a square conflict . . . ."); Michael S. Schenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts*, 59 N.Y.U.L. Rev. 1007, 1013-14 ("when two courts apply the same legal rule to similar facts and reach different conclusions, the presumption is that there is no conflict.").

B. This Case Is A Poor Vehicle to Address the Relationship Between Federal and State Law in this Area Because of the Unique Facts of this Case.

Another factor that argues for allowing this issue to percolate further in the lower courts is that this case is a very poor vehicle to address the broad question that AT&T wishes this Court to answer. AT&T asks this Court to determine if any state laws may ever be applied to any term in a long-distance contract, but in fact the state laws at issue here fall within a narrow and unusual category – laws that are necessary to ensure

that consumers are not stripped of their ability to effectively vindicate their rights under any and all state consumer protection laws. Even AT&T has not claimed that it is exempt from all state consumer protection laws; it has only claimed that those laws may not be applied to the terms of their contracts. With respect to other behavior, however, throughout this litigation AT&T has acknowledged, as it must, that state consumer protection laws are not preempted as they apply to deceptive or false statements about the terms of a contract. In this case, however, applying state consumer protection and contract laws to the terms of the Original was necessary to ensure that those laws are not vitiated with respect to all issues.

As set forth above, after a full trial on the matter, the trial court below made a finding of fact that the Original CSA would bar many of AT&T's customers from effectively vindicating even valid claims under state consumer protection acts. This finding, which is entitled to great deference, is not challenged in AT&T's Petition. This finding makes the state laws at issue in this case uniquely consistent with the FCA, because several provisions of the Act explicitly rely upon state consumer protection acts to achieve its purposes. *See* 47 U.S.C. § 253 (preserving "consumer protection" laws relating to new carriers entering the long distance field); 47 U.S.C. § 254 (preserving a role for states in ensuring that universal service is available at rates that are just, reasonable and affordable); 47 U.S.C. § 261(c) (preserving state laws that further competition in the provision of phone exchange services). Thus, the state laws at issue in this case are uniquely essential to the effective operation in any case of any state laws. Unlike most settings where the relationship of federal and state law might be explored, AT&T's Petition raises the unusual spectre that its interpretation of §§ 201 and 202 would enable the company to

to promulgate contract terms that would vitiate §§ 253, 254 and 261.

This case is also a poor vehicle in light of the fact that AT&T has re-written three of the contract provisions at issue. While AT&T surely has a technical right to appeal a judgment declaring these provisions illegal, in case it might some day wish to resurrect them, it is a poor use of this Court's resources to adjudicate the legality of contract terms that have been abandoned for more than a year.

C. Any Split That May Exist Between This Case and *Boomer* is Immature.

It would also be premature for this Court to review the alleged conflict at issue here. The FCC only de-tariffed long distance service on August 1, 2001, and only two courts have considered this issue since that date. The novelty of this issue increases the value of allowing the law to develop further in the lower courts. The *Boomer* decision was issued only a few weeks after the FCC handed down its decision in *Orloff*, for example, and the *Boomer* court did not cite to or mention *Orloff*. In *Boomer*, the Seventh Circuit declared that §§ 201 and 202 require service to be uniform to all customers. In *Orloff*, however, the FCC made clear that carriers are free to charge different rates to different customers based on individual negotiations. This demonstrates the value in allowing the law to develop here. In its great haste (the Seventh Circuit issued its decision only about ten weeks after the appeal was filed), the Seventh Circuit missed the FCC's clear statement that it would rely upon competition to enforce §§ 201 and 202, and that uniformity was no longer required in the detariffed regulatory scheme. This Court should not repeat the mistake of rushing to

resolve the issue even as the FCC's brand new regulatory scheme settles in.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. There Is No Express or Field Preemption Here.

This Court has recognized three situations where federal law preempts state law: where a Congressional Act has "an express provision for preemption;" where Congress intends federal law to "occupy the field," and "to the extent of any conflict with a federal statute." *Crosby v. National Foreign Trade Council*, 530 U.S. 353, 372 (2000). None of these situations applies here.

The FCA does not expressly preempt the plaintiffs' claims. AT&T relies upon § 201 of the Act, which requires that the terms of service be just and reasonable, and § 202, which forbids unjust or unreasonable preferences in long distance service. Neither of these provisions purports to preempt any state laws. Neither provision uses the term preemption, or speaks of foreclosing state laws of contract formation or consumer protection statutes.

In addition, the FCA contains a general Saving Clause (as well as other provisions saving state consumer protection laws, as noted above). The FCA states that "nothing in this Act . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act . . .

are in addition to such remedies." 47 U.S.C. § 414.[8] This Court has interpreted express preemption provisions narrowly in statutes where there are Savings Clauses. *See Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 526 (2002) (reading express preemption provision of Federal Boat Safety Act of 1971, 46 U.S.C. 4301 narrowly not to reach common law claims in light of Act's savings clause). Accordingly, it is clear that the FCA does not expressly preempt plaintiffs' claims.

Nor can it be said that the FCA preempts the entire field of long distance telephone service. As noted above, the FCA's savings clauses carve out important roles for state law. Where a statute expressly preserves an extensive role for states, any claim of field preemption is foreclosed.

B. There Is No Implied Conflict Preemption Here.

Implied preemption arises only when there is an "actual conflict" between federal and state law, either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). There is no such conflict here.

First, the Ninth Circuit's decision is entirely consistent with the FCC's repeated public statements about the effect of

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[8] In *Central Office*, this Court held that § 414 could not be used to put the FCA at odds with itself by undermining the uniformity necessarily required by § 203. In the wake of detariffing, however, and the FCA's explicit reliance upon state consumer protection acts in several different provisions, nothing in §§ 201 or 202 overrides § 414.

detariffing and the relationship of state and federal law. As noted in the Statement of the Case, when the FCC announced its decision to detariff, it declared that consumers would not only have remedies under the FCA, but would "also be able to pursue remedies under state consumer protection and contract laws." *Second Report and Order*, 11 FCC Rcd 20730, 20753 (1996). As set forth in some detail above, when AT&T complained and asked the FCC to reconsider, the FCC's response was to agree that it would continue to enforce the FCA. It did not state that any state laws were preempted or excluded by the FCA, however, and it did not retract the statement that consumers would continue to have remedies under state contract laws.

AT&T's argument that state laws of contract formation and consumer protection are preempted if they would limit the terms of long distance service contracts is flatly contrary to the FCC's statements on this issue. In its Order on Reconsideration, the FCC stated explicitly that state laws of contract formation apply to long distance contracts, and that consumers would have remedies under state laws of contract and consumer protection regarding the "legal relationship" between the carrier and consumers. 12 FCC Rcd 15,014 at § 77. Plaintiffs' claims here are based on precisely these state laws.

In short, AT&T's repeated reliance upon the word "agreed" in the Order on Reconsideration overstates the import of the ruling. In substance, the FCC agreed with AT&T's petition only in part. The FCC agreed with AT&T only to the extent that it acknowledged that it was not wholly abandoning its authority under § 201and § 202. But the FCC declined to take the second and more important step requested by AT&T, and never claimed to exert *exclusive* federal authority over long

distance contracts. To the contrary, it firmly reasserted the important role to be played by state law effective August 1, 2001.

The FCC's detariffing orders also state that carriers are to be treated like all other businesses in unregulated markets, 11 FCC Rcd. 20,730 at ¶ 4, further disproving AT&T's position. All other unregulated businesses in the U.S. are subject to state contract law and state consumer protection laws. The FCC states that AT&T is also subject to these laws.[9] As established in the Statement of the Case, when the FCC states that it is counting upon "market forces" to ensure that § 201and § 202 are enforced, it has repeatedly stated that those forces include state contract and consumer protection laws. Indeed, when a carrier suggested that the FCC's reliance upon market forces implied an exemption from "the neutral application of state contractual or consumer fraud laws," the FCC flatly and explicitly rejected that claim. *Matter of Southwestern Bell*, 14 F.C.C.R. at 19,903.

As set forth above, in the *Orloff* case the FCC completely rejected AT&T's notion that absolute federally-imposed uniformity is the rule in the detariffed world. Far from requiring uniformity, the FCC has permitted a carrier operating in a deregulated environment to negotiate separate contracts with each customer.

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[9] After the Order on Reconsideration, the FCC continued officially to inform consumers that they are protected by the "full range" of state laws relating to contracts and consumer protection. App. 51a, 105a. The FCC also tells consumers that it is *not* their exclusive remedy: "If you are not satisfied with the carrier's response to your complaint, the Commission's rules allow you the opportunity to either file a formal complaint or seek relief through civil court." App. 27a.

The Ninth Circuit's decision is also consistent with the text, structure and purpose of the FCA. When Congress chose to allow the FCC to detariff long-distance service, and to require the carriers to form contracts with their customers, it necessarily chose to permit state contract law to play a significant role. The filed rate doctrine arises from federal law, but a contract "is not the filed rate and therefore is not a simple creature of federal law." *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 487 (2d Cir. 1998). Given that contracts – unlike tariffs – are not a species of federal law, it follows that state law must govern them.

In addition, as set forth by extensive citations in both opinions below, AT&T's argument is belied by the legislative intent underlying the Act. When Congress deregulated the long-distance market, it drastically de-emphasized the role and power of the FCC, and frequently expressed concerns for federalism. App. 5a, 26a-27a, 48a-49a. To treat the 1996 Amendments as having left the FCC's exclusive authority entirely intact is to re-write this history.

Further, AT&T's interpretation of § 201and § 202 places those provisions at odds with numerous other provisions of the FCA. As set forth in the Statement of the Case, after reviewing extensive evidence, the district court made a factual finding (that AT&T challenged in the Ninth Circuit, but has not challenged in its Petition) that the Original CSA would prevent consumers from effectively vindicating their legal rights under state consumer protection statutes. As also set forth above, however, the 1996 Amendments added a number of other savings clauses to the Act, evidencing a Congressional desire to preserve a meaningful role for the states in this area. *E.g.* 47 U.S.C. §§ 253(b), 254(I), and 261(c). A decision adopting AT&T's argument that § 201 and § 202 implicitly permit it to

adopt contract terms that will effectively vitiate those laws would undermine the overall purposes of the FCA.[10]

None of the authority cited by AT&T to support its FCA preemption argument withstands scrutiny. AT&T relies extensively upon the *Esteve* case from 1922, for example. See Petition at 2, 4, 20-21. *Esteve*, however, arose in the entirely different context where long-distance service was a natural monopoly and where the federal government could not rely upon "market forces" (as those have been defined by the FCC). These very different assumptions are made clear in the opinion -- the fundamental precept of *Esteve* was that the terms of long distance service were *not* based upon contract principles, but were instead a matter of *law*. 25 U.S. at 271. The entire point of the 1996 Amendments and the FCC's decision to detariff, by contrast, is to make clear that now – unlike 1922 – long distance service is to be governed by *contract* principles.

AT&T also repeatedly cites *Central Office*, 524 U.S. 214, Petition at 2, 20, 22, but the holding in *Central Office* is driven and bounded by the principles and rationale of the filed rate doctrine, and does not apply in the detariffed environment. For example, the *Central Office* Court concluded that the plaintiffs' claims there were barred because they related to "privileges not included in the tariff," 524 U.S. at 226, and repeatedly posed as the determinative issue whether the filed

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[10] AT&T's position that § 202 requires that it be allowed to gut state consumer protection acts is inherently at odds with the language of the statute. The language of § 202 permits "just" and "reasonable" variations in service, and does not require absolute uniformity. There is nothing "unjust or unreasonable" about precluding long distance carriers from stripping consumers of their rights under state consumer protection laws, and their ability to effectively vindicate such rights.

rate doctrine applied to the claims at issue. 524 U.S. at 216, 221-26. AT&T argues that *Central Office* could just have well been decided on the grounds of § 201 and § 202, but as the Ninth Circuit correctly pointed out, this interpretation of § 201 and § 202 would render § 203 superfluous. App. 18a. AT&T's claim that the decision below conflicts with this Court's decision in *Central Office* is based upon the faulty presumption that this Court's decision on one theory might instead have been rendered upon a completely different theory not actually embraced by the Court.

C. The Decision Below Will Not Harm the Long-Distance Industry.

AT&T asserts in its Petition that the decision below will adversely affect the entire long distance industry and subvert the FCC's regulation of it. Nothing could be further from the truth. The Ninth Circuit's decision simply prevents AT&T from eliminating its customers' rights under state law – rights that the FCC has said those customers may enforce to protect itself. The FCC has also stated that requiring long distance carriers to comply with the same laws that govern other competitive industries will not increase the costs of those carriers or otherwise harm them. 12 FCC Rcd. 15,014 at ¶15. In addition, it is hard to accept AT&T's statement that the ruling below was devastating to its ability to operate its business when AT&T itself re-wrote three of the four provisions of the Original CSA that were struck down more than a year ago, with no apparent harm to its business.

CONCLUSION

For the foregoing reasons, the Petition for *Certiorari* should be denied.

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Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

DARCY TING, An Individual
And On Behalf Of All Others Similarly Situated, And
CONSUMER ACTION, A Non-Profit Membership Organization,
Both As Private Attorneys General,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

AT&T demonstrated in its petition that the Ninth Circuit's decision below creates a square and acknowledged conflict with the Seventh Circuit's decision in *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002), as to whether the lawfulness of rates, terms, and conditions of interstate long distance telephone service is governed by federal or state law. AT&T further demonstrated that the Ninth Circuit's decision to enforce state rather than federal law conflicts both with prior decisions of this Court holding that sections 201 and 202 of the Communications Act preempt state law challenges to contractual provisions governing the liability of communications common carriers even in the absence of any statutory requirement to file tariffs, and with the FCC's policies and *Detariffing Orders* implementing Section 10 of the Act, 47 U.S.C. § 160.

The importance of the question presented is plain. There are numerous companies that each offer interstate telecommunications services to millions of residential customers nationwide. As the *amicus* brief filed by BellSouth, Qwest, and Verizon, and the additional *amicus* brief by MCI/WorldCom and Sprint confirm, it is of vital importance that common carriers know whether the lawfulness of the terms on which they offer their services are governed by federal or state law. The current situation, in which otherwise nationally standard terms of service are subject to different legal standards in California than in the states of the Seventh Circuit, and in which no carrier knows what law governs their contracts in any other state, has created tremendous confusion and uncertainty over the applicable law and is imposing significant and unnecessary litigation costs on carriers and their customers. Outside of California and the Seventh Circuit, for example, no carrier or customer knows today whether lawsuits brought as putative class actions (and many are pending) will be resolved in a class action proceeding in state or federal court, or

alternatively must proceed on an individual basis through arbitration, in small claims court, or in a complaint proceeding before the FCC.

Each of the considerations by which this Court traditionally evaluates a petition for a writ of certiorari thus supports a grant of the petition. Respondents' attempts to distinguish the decisional conflicts and to downplay the legal and practical significance of the question presented are forced and unpersuasive.

A. Respondents Fail To Distinguish *Boomer*

1. Respondents first claim that the split with *Boomer* is insignificant because the two cases evaluated "very different contracts." Opp. 3, 16. This is incorrect for two reasons.

First, the Ninth Circuit's refusal to follow the Seventh Circuit did not turn on any difference in the contractual provisions. Rather, the Ninth Circuit refused to follow the Seventh Circuit's legal analysis of the scope of federal preemption, which it labeled "novel." Pet. App. 10a-11a.

Second, and in any event, the key contract provisions at issue in *Boomer* and in this petition are identical. The heart of each dispute is whether AT&T may enforce its dispute resolution provision foreclosing class actions and requiring customers to bring such claims to individual arbitration, to small claims court, or to the FCC. The Seventh Circuit, applying federal law, found this dispute resolution provision of the Consumer Services Agreement enforceable; the Ninth Circuit, applying state law to the same dispute resolution provision, did not.

In this regard, Respondents' attempt to raise the specter of an adequate and independent "state-law ground" (Opp. 18) for affirming the decision below has no merit. There cannot be such a ground in a case such as this, where the question presented is whether the District Court was permitted to apply state law at all. Under the Seventh Circuit's analysis, state

law simply has no role to play in evaluating the substantive reasonableness of the rates, terms and conditions of interstate telecommunications service.[1]

2. Respondents next claim that the *Ting* and *Boomer* decisions "shared many precepts, and only disagreed about fairly narrow aspects" of the law. Opp. 4, 20. This is untrue, as any fair-minded review of *Boomer* and *Ting* readily shows. *Boomer* sets forth in detail the Seventh Circuit's views that §§ 201 and 202 preempt the application of state law, that these provisions operate in particular to preempt state unconscionability law to the extent it is invoked to invalidate arbitration requirements and class action bans, that the preemptive effect of §§ 201 and 202 is independent from the preemptive scope of § 203 and the filed tariff doctrine, and that the FCC's *Detariffing Orders* confirm that state law does not govern the lawfulness of the rates, terms, and conditions of interstate telecommunications service. See *Boomer*, 309 F.3d at 418-23.

The Ninth Circuit did not distinguish *Boomer* on its facts but instead directly and necessarily rejected each of the *Boomer* court's core holdings. See Pet. 17-19. Indeed, the *Ting* court's rejection of *Boomer* was determinative of the Ninth Circuit's ultimate decision. Pet. App. 10a-11a. Conversely, the ostensibly shared "precepts" on which respondents rely include some points (such as the role of state

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[1] Respondents only confirm their continuing confusion over these matters when they claim that the alleged unlawfulness of two provisions of the CSA under federal law would provide a basis under state law for the Court to affirm the invalidation of the arbitration and class action provisions. As Respondents concede (Opp. 17), they expressly disclaimed below making any challenge to the lawfulness of any provision of the CSA under the Communications Act, and so there are no determinations regarding the lawfulness of these provisions under the FCA in this case. And even if there were, such findings still could not justify a further holding under *state* law that *other* provisions, such as the requirement of individual arbitration and the class action bar, are invalid, for once again that would be an application of state law that is preempted under the FCA.

law in governing contract formation, see Opp. 20-21) that AT&T itself has acknowledged and not challenged since day one. The Ninth Circuit recognized that its decision departed dramatically and significantly from that of the Seventh Circuit (Pet. App. 11a), and respondents err in pretending otherwise.

3. Respondents attempt to argue that this case is a "poor vehicle" to address the question presented (Opp. 4, 20-22), but present no coherent reason why this is so. They chiefly discuss their view of the merits of state law in supplanting the "era of lawlessness" they believe would result from the continuing application of uniform federal requirements of reasonableness and nondiscrimination (*id.* at 12, 20-21), but fail to identify any respect in which these facts do not fairly present, or why the Court could not reach, the question presented. Respondents do note (*id.* at 22) that AT&T has revised the CSA with respect to some of the provisions that respondents originally challenged, but their reliance on this point is both disingenuous and unavailing. The focus of respondents' lawsuit has always been to invalidate the dispute resolution provision barring class actions and requiring individualized arbitration, and that is the provision that was enforced in *Boomer* and that AT&T seeks to validate here.

Respondents do not and cannot argue that the provision of the CSA mandating individualized arbitration and barring class actions is invalid under the FCA. Their only argument is that this provision is invalid under state law. The validity and enforceability of the arbitration/class action provision thus turns entirely on whether federal law governs (as the Seventh Circuit held, in compelling individual arbitration) or state law governs (as the Ninth Circuit held, in invalidating the provision). Indeed, the Seventh Circuit expressly considered and rejected the lengthy District Court decision in *Ting* that the Ninth Circuit later affirmed, and thus was fully aware – contrary to respondents' claims – of the "factual record[]" (*id.* at 19) in *Ting* that could be cited in support of a state-law unconscionability challenge. The conflicting courts

of appeals thus considered largely the same record and arguments. It is difficult to imagine a better vehicle than this case for resolving the stark conflict on the question of federal preemption presented here.

4. Unable to distinguish *Boomer*, respondents argue that it is "premature" for the Court to address the conflict. Opp. 22. In their view, the Seventh Circuit erred in "rushing to resolve the issue." *Id.* at 22-23. They therefore urge this Court to allow the law to "develop and percolate." *Id.* at 4.

Although respondents criticize the Seventh Circuit for having decided *Boomer* quickly, the opinion is thoughtful and well-reasoned, and respondents cannot and do not argue otherwise. Their only substantive criticism (*id.* at 22) is that the Seventh Circuit did not "cite to or mention" the FCC's decision in *Orloff* v. *Vodafone Airtouch Licenses LLC*, 17 FCC Rcd. 8987 (2002).

Consideration of *Orloff*, however, would not have altered the Seventh Circuit's decision. The FCC broke no new ground in *Orloff* regarding the requirements of §§ 201 and 202, but instead applied long-standing principles that pre-date the FCC's detariffing decisions. *Id.* at 8994 (¶ 14) & nn.43-44 (citing precedent setting forth governing legal standards). In upholding the individually negotiated rates in *Orloff*, the Commission found that the rates afforded no unlawful preferences and reaffirmed that it would not "hesitate to find that unreasonable discrimination violates section 202." *Id.* at 8998 (¶ 22). Not only did the FCC not purport to alter the prohibition against state-law based geographic preferences, it "emphasize[d]" that *Orloff* was "confined to the facts of th[at] case," *Id.* at 8999 (¶ 24) n.79, and cautioned that "what is reasonable in this market does not necessarily translate to other markets" (*id.* at 8998 (¶ 22)), leaving no doubt that *Orloff* was simply a fact-specific application of longstanding FCC standards concerning negotiated rates.

In any event, speculation about what another Court might say is beside the point, because resolution of this question is urgently needed. Within months of the District Court's decision in *Ting*, more than 50 class action lawsuits were filed against AT&T, MCI, and Sprint alleging that they overcollect from customers for amounts contributed to the federal Universal Service Fund ("USF"). Most of these USF cases have been consolidated by the Judicial Panel on Multi-District Litigation, and are pending in the United States District Court for the District of Kansas. The motions of AT&T and Sprint to compel arbitration of these actions are fully briefed, but not decided. In an opinion filed May 27, 2003, the MDL court stated that it "will retain the motions under advisement at least until the United States Supreme Court decides whether it will grant AT&T's petition for writ of certiorari in *AT&T Corp. v. Ting*, No. 02-1521."[2] Several other actions are currently pending against AT&T, including two state court class actions in Illinois (one of which followed *Boomer* and another which did not),[3] one in Massachusetts (which followed *Boomer*),[4] and four USF cases that are pending in various state courts and have been stayed pending a decision by the MDL court.[5]

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[2] *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468, slip op. at 1 (D. Kan. May 27, 2003) (Memorandum and Order), *available at* http://www.ksd.uscourts.gov.

[3] *See Ragan* v. *AT&T Corp.*, No. 02 L 168 (Cir. Ct. Madison Cty. Ill.) (refusing to follow *Boomer*), *appeal pending*, No. 5-03-0038 (5th Dist. App. Ct docketed Jan. 17, 2002); *Ramette* v. *AT&T Corp.*, No. 01 CH 17702 (Cir. Ct. Cook Cty. Ill. Nov. 21, 2002) (granting motion to compel), *appeal pending*, No. 1-03-0031 (1st Dist. App. Ct. docketed Jan. 3, 2003).

[4] *See Kisala* v. *AT&T Corp.*, 02-CV-10752-MEL, slip op. at 8-9 (D. Mass. Jan. 15, 2003) (Memorandum and Order) (following *Boomer*).

[5] *See Gordon* v. *AT&T Corp.*, No. 02601262 (Sup. Ct. N.Y. Cty. N.Y. filed Apr. 2, 2002); *Myhre* v. *AT&T Corp.*, No. GIC 791275 (Super. Ct. San Diego Cty. Cal. filed June 25, 2002); *Thomas* v. *AT&T Corp.*, No. BC 271088 (Super. Ct. L.A. Cty. Cal. filed Apr. 2, 2002); *Hood* v. *AT&T Corp.*, No. CV 02-1677 (Cir. Ct. Jefferson Cty. Ala. filed Nov. 27, 2002).

The threshold issue in all of these cases is the enforceability of the arbitration provision in the CSA. As the MDL proceedings and *amicus* briefs make clear, the issue is one that affects all interstate communications carriers. Little good would be served by waiting for more courts to choose up sides between *Ting* and *Boomer*. The cost to litigants in extended appeals, uncertainty, and avoidable litigation costs is damaging and wasteful. And as the *amici* explain at length, the uncertainty is particularly great here, because it is not limited to the issue of whether federal or state law governs. Rather, in the event a particular court holds that state law governs, there is no basis to predict how that court will apply state law, because the substantive lawfulness of the terms of interstate telecommunications service has been governed, since its inception, by federal law.[6]

The legal issues relevant to the Court's resolution of the preemption issue are well-developed in the two conflicting circuit court decisions. The volume of lower court litigation makes it inevitable that this Court will need to resolve that conflict. In these circumstances, there is no benefit, but only great cost, to delaying resolution of this issue.

Finally, even apart from the pending litigation, the remedy ordered in this case alone merits this Court's plenary review. This is not a simple damages case. Absent this Court's review, AT&T will remain subject to a permanent injunction in California that bars AT&T from enforcing terms that another circuit court of appeals has held to be immune from challenge under state law and fully enforceable, and that are concededly lawful under federal law. This injunction, which

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[6] No carrier could have predicted, for example, that mailing a cover letter and a short, standard-form contract to customers in an envelope marked "**Attention**: Important information concerning your AT&T service enclosed" would be "procedurally unconscionable" under state law, particularly since the FCC had expressly stated its expectation that customers would be notified of their terms of service in this fashion. *Compare* Pet. 8-9, *and* Pet. App. 107a-109a, *with* Pet. App. 89a.

currently governs AT&T's contractual relationships with 7 million long distance customers in California, is itself of unusual scope and national importance. Given the conflicting holdings of the courts of appeals, this injunction should not be permitted to stand without further review by this Court.

B. Respondents' Other Arguments Lack Merit

The square and significant conflict with *Boomer* is more than ample grounds to justify granting the petition. Nevertheless, AT&T has also shown that the Ninth Circuit's decision conflicts with decisions of this Court and with the FCC's *Detariffing Orders*. These conflicts also warrant this Court's review. Respondents disagree only by ignoring or misconceiving this Court's decisions and the FCC's orders.

1. Respondents cannot deny that this Court has repeatedly held that § 202(a) preempts state-law claims that "'constitute unlawful preferences'" even absent any tariff-filing requirement. See Pet. 20-22 (discussing, *inter alia*, *Postal Tel.-Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27 (1919) and *Western Union Tel. Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921) (Brandeis, J.)). They argue only that the factual context for *Esteve* was one of monopoly rather than of competition in long distance service, and assert that *Esteve* is no longer good law in light of "the 1996 Amendments" to the Communications Act "and the FCC's decision to detariff." Opp. 28.

Respondents' attempt to support their thesis is conspicuously thin. They ignore that Congress, in 1934, borrowed the operative preemption language of the Communications Act from the Interstate Commerce Act in order to preserve the value of prior court and commission interpretations of that language. See Pet. 4. They similarly ignore the language of Section 10 of the FCA, which permits the FCC to forbear from enforcing provisions of the Act only where the FCC makes certain findings that the FCC has never attempted to make with respect to §§ 201 and 202. See Pet.

6-7, 25. And they mistakenly construe provisions of the FCA that pertain to intrastate service as applicable to interstate service. Compare Pet. 6, and *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999), with Opp. 21, 27.

For these and other reasons, the likelihood that respondents could demonstrate that Congress or the FCC has effectively swept aside this Court's prior constructions of the preemptive scope of §§ 201 and 202 is remote. But even taken at face value, respondents' notion that Congress, *sub silentio*, has now rendered prior holdings of this Court a nullity is itself a reason to grant this petition. Indeed, this Court reaffirmed the vitality of these prior holdings in *AT&T Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214, 228 (1998) ("*COT*"). Respondents not only fail to address the pertinent holding of *COT* (compare Pet. 22, with Opp. 28-29), but revive an argument about the FCA's "Savings Clause" (see Opp. 23-24 & n.8) that this Court has repeatedly rejected.[7] In these ways, the Opposition underscores petitioner's showings that the Ninth Circuit decided the case erroneously and that the conflict with this Court's decisions merits review.

2. Respondents also fail to mount any convincing defense of the Ninth Circuit's interpretation of the FCC's *Detariffing Orders*. Like the Ninth Circuit, respondents can point only to snippets in the FCC's orders that they claim support their view. And like the Ninth Circuit, they cannot offer any interpretation of the FCC's decision to grant AT&T's petition for clarification that both supports their argument and can be reconciled with the context in which AT&T's petition arose and with the FCC's resolution of it.

According to respondents, the Commission "agreed" with AT&T's request for clarification "only to the extent that it acknowledged that it was not wholly abandoning its authority under § 201 and § 202." Opp. 25. But AT&T never sought

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[7] *See COT*, 524 U.S. at 227-28; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907).

clarification that the FCC would continue to consider challenges to the legality of rates, terms and conditions of interstate services under §§ 201 and 202. The *Detariffing Order* left no doubt that the Commission would continue to remedy violations of §§ 201 and 202 through its authority "to investigate and adjudicate complaints under Section 208." *Interstate Interexchange Marketplace*, 11 FCC Rcd. 20,730, 20,743 (¶ 21) (1996); see also *id.* at 20,750 (¶ 36) (FCC's continued "administration of the Section 208 Complaint process" would address violations of "Sections 201 and 202").

Contrary to respondents' argument (Opp. 24-26), the FCC expressly understood that AT&T sought clarification that "federal, and not state, law governs the determination as to whether a [carrier's] rates, terms and conditions . . . are lawful." *Interstate Interexchange Marketplace*, 12 FCC Rcd. 15,014, 15,056 (¶ 76) (1997). After "agree[ing]" with AT&T that "the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions," the Commission explained further that "the Communications Act does not govern other issues, such as contract formation and breach of contract" for which "consumers may have remedies under state consumer protection and contract laws." *Id.* at 15,057 (¶ 77). These conclusions cannot be reconciled with respondents' position that the lawfulness of rates, terms and conditions of interexchange service – matters which lie at the heart of the Communications Act – are nevertheless now governed not by federal law, but by state law.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 02-1521

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

DARCY TING, An Individual
and on Behalf of All Others Similarly Situated, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* MCI WORLDCOM COMMUNICATIONS, INC. AND SPRINT CORPORATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

MCI WorldCom Communications, Inc. ("MCI") and Sprint Corporation ("Sprint") (collectively, "*amici*"), are nationwide providers of a wide variety of telecommunications services, including long distance services.[1] The Ninth Circuit's holding in this case threatens to alter substantially the way *amici* provide their long distance services to millions of residential and small business consumers, and it threatens to impose serious costs on *amici* and higher rates on their customers.

Like Petitioner AT&T Corp. ("AT&T"), MCI and Sprint generally provide long distance services to residential and small business customers pursuant to uniform nationwide agreements. Like the agreement used by AT&T, the agreements used by MCI and Sprint incorporate dispute resolution provisions that rely on arbitration and other alternative dispute mechanisms to minimize the costs of customer disputes, and allow MCI and Sprint to offer reduced rates to their customers. And like AT&T, MCI and Sprint have seen their settled understandings about the legality of these provisions upended by a decision of the Ninth Circuit that casually discards nearly a century of settled law.

As a result of the decision below, long distance carriers such as *amici* are entering an extended period of

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

legal uncertainty. Rather than a coherent national communications policy formed by a single agency with a thorough understanding of interstate telecommunications, long distance providers must engage in Circuit-by-Circuit warfare with plaintiffs' class action lawyers to determine first, whether state or federal law governs, and second, in Circuits where state law governs, what state law requires. That exercise will be a substantial drain on resources at a time when telecommunications companies such as *amici* can least afford it.

Accordingly, *amici* have a strong interest in making sure that this Court reviews, and ultimately reverses, the Ninth Circuit's decision in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case threatens to alter substantially the way *amici* MCI and Sprint contract to provide their long distance services to millions of residential and small business customers, imposing significant costs on *amici* and higher rates on consumers. Moreover, the decision will strain scarce judicial resources, as plaintiffs engage in Circuit-by-Circuit class action litigation to establish first, whether in that Circuit federal law or state law governs interstate long distance contracts, and second, in Circuits that hold (as did the Ninth Circuit) that state law governs, what precisely state law requires.

Such an outcome would be troubling under any circumstances, but here it is especially so, because the Ninth Circuit's decision stands alone. As AT&T's Petition for a Writ of Certiorari demonstrates, the decision squarely conflicts with a decision of the Seventh Circuit applying

identical provisions of federal law to identical contractual provisions, and it is inconsistent with decisions of this Court and orders of the Federal Communications Commission ("FCC" or "Commission").

Review by this Court is urgently needed. At the outset, the impact of the Ninth Circuit's decision extends well beyond the confines of this case. The AT&T Customer Services Agreement (the "AT&T Agreement") at issue is used nationally, and it will be subject to further challenge in States outside the Seventh Circuit if this Court lets the Ninth Circuit's decision stand. More important from the perspective of the *amici*, the nationwide agreements employed by *amici* MCI and Sprint contain dispute resolution provisions similar to those in the AT&T Agreement, requiring, for example, that consumers arbitrate complaints that are not brought in small claims court or before the FCC. MCI's agreements, like the AT&T Agreement, also expressly prohibit the use of class actions. These and other previously uncontroversial provisions are subject to attacks as a result of the Ninth Circuit's decision.

The consequence of those attacks will be "patchwork contracts," *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002), as fifty States apply their own particular notions of unconscionability to invalidate individual provisions of nationwide agreements that have long been held to be "just and reasonable" by the FCC. The attacks will also impose substantial transaction costs and, inevitably, higher rates, resulting both from the increased uncertainty regarding the liability regime that governs contracts for long distance services, and from the invalidation of provisions – such as the arbitration provisions invalidated by the Ninth Circuit in this case – that permit reduced rates for consumers. Whether

borne principally by providers of long distance companies or passed on to consumers, such costs are inconsistent with the Communications Act of 1934 ("Communications Act") and with the competition that Congress and the FCC sought to encourage and preserve.

Review of the decision below is particularly appropriate because, in reaching its decision, the Ninth Circuit created a direct Circuit split and cast aside nearly a century of settled law. First and foremost, the decision of the Ninth Circuit conflicts directly with the decision of the Seventh Circuit in *Boomer*, as the Ninth Circuit itself acknowledged. Pet. App. 11a. The Ninth Circuit held that Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201, 202, do not preempt state unconscionability law challenges to the AT&T Agreement. The Ninth Circuit thus affirmed a decision of the district court that declared unconscionable under California law certain provisions of the AT&T Agreement, including dispute resolution provisions that generally require consumers to resolve disputes through arbitration and that limit the availability of class actions. By contrast, in *Boomer*, the Seventh Circuit concluded that Sections 201 and 202 do preempt state law challenges to these precise dispute resolution provisions.

Second, the decision of the Ninth Circuit conflicts with decisions of this Court holding that the non-discrimination provisions contained in federal communications statutes preempt state law challenges to rates, terms, and conditions governing interstate telecommunications services. In *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919), for example, this Court upheld a limitation-of-liability provision contained in a telegraph contract notwithstanding the

unenforceability of that provision under state law. The Court held that the congressional goals embodied in the nondiscrimination provisions that were the statutory predecessors of Sections 201 and 202 "would be wholly destroyed if . . . the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws." 251 U.S at 30; *see also Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 573-74 (1921) (noting that once a reasonable rate was established by a telegraph company, federal law "required that it should have exactly the same force and effect as the rate" contained in a filed tariff). Moreover, the Court reached this conclusion despite the absence of any statutory tariff-filing requirement – that is, the nondiscrimination provisions themselves rather than the presence of tariffs preempted state law. *See* 256 U.S. at 573-74. The Ninth Circuit's refusal to recognize the preemptive force of the current non-discrimination provisions of the Communications Act cannot be reconciled with these decisions.

Third, the decision of the Ninth Circuit in this case is inconsistent with the FCC orders implementing detariffing. In the wake of the Commission's initial detariffing order, AT&T, supported by MCI and Sprint, sought clarification that "federal, and not state, law governs the determination as to whether a nondominant interexchange carrier's rates, terms, and conditions for interstate, domestic, interexchange services are lawful." *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 F.C.C.R. 15014 ¶ 76 (1997). The FCC "agree[d]" that "the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions," and the Commission clarified that

state law applied only to "issues, such as contract formation and breach of contract," *i.e.*, issues regarding "the legal relationship between the carrier and customer in a detariffed regime." *Id.* ¶ 77. The Ninth Circuit has unapologetically – and erroneously – excised that holding from the FCC's order.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's misreading of the preemptive scope of Sections 201 and 202 of the Communications Act will impose substantial transaction costs on companies, like *amici* MCI and Sprint, that provide long distance telecommunications services, resulting in higher prices and fewer choices for consumers.

1. Although the Ninth Circuit's decision in this case, like the Seventh Circuit's decision in *Boomer*, dealt with dispute resolution provisions contained in AT&T's nationwide customer agreements, the impact of the Ninth Circuit's decision is far broader: the nationwide agreements used by many long distance companies contain mandatory arbitration provisions and class action limitations that are similar to those at issue here, and are now subject to attack.

MCI, for example, provides long distance services to "mass markets" customers pursuant to two nationwide agreements: a General Service Agreement for Residential Customers ("MCI Residential Agreement") and a General Service Agreement for Small Business Customers ("MCI Small Business Agreement") (collectively, the MCI Agreements"). Each of the MCI Agreements contains provisions that generally require arbitration and that limit the availability of class relief. Section VIII of the MCI

Residential Agreement, for example, is entitled "DISPUTE RESOLUTION," and it states that "THIS SECTION PROVIDES FOR RESOLUTION OF MOST DISPUTES THROUGH BINDING ARBITRATION." Section VIII(D) further explains that

> [a]ny dispute arising out of or related to this Agreement or the Company's products or services that is not satisfactorily resolved within 60 days from the date on which you notify the Company in writing, regardless as to whether the dispute is based in contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory, must be submitted either to the American Arbitration Association ("AAA") or to JAMS ("JAMS") for final and binding arbitration.[2]

In addition, Section VIII(J) limits the availability of class relief, providing that

> [e]ach dispute will be decided on an individual basis and will not be consolidated in any action with the disputes or claims of other consumers or customers. You agree that you may not bring any dispute or claim as a class action or as a private attorney general, and you agree not to act as a class representative or participate as a member of a class of claimants with respect to any dispute

[2] Section VIII(E) of the MCI Residential Agreement makes clear that, under AAA Rules and JAMS Rules, consumers may also have the right to take certain disputes to small claims court or to seek relief from appropriate governmental agencies such as the FCC.

> or claim relating to this Agreement or the services provided by the Company.

The MCI Small Business Agreement contains identical provisions. *See* MCI Small Business Agreement § VIII(D), (E).

Similarly, the agreement that defines the rates, terms, and conditions of Sprint's long distance services ("Sprint Terms Agreement") provides as follows:

> MANDATORY ARBITRATION OF DISPUTES. ANY CLAIM, CONTROVERSY OR DISPUTE OF ANY KIND BETWEEN YOU AND SPRINT AND/OR ANY OF ITS EMPLOYEES, AGENTS, AFFILIATES OR OTHER REPRESENTATIVES, WHETHER SOUNDING IN CONTRACT, STATUTE, OR TORT, INCLUDING FRAUD, MISREPRESENTATION, FRAUDULENT INDUCEMENT, OR ANY OTHER LEGAL OR EQUITABLE THEORY AND REGARDLESS OF THE DATE OF ACCRUAL OF SUCH CLAIM, CONTROVERSY OR DISPUTE WILL BE RESOLVED BY FINAL AND BINDING ARBITRATION AS PRESCRIBED IN THIS SECTION. . . .

Sprint Terms Agreement § 8.4.[3] Thus, MCI and Sprint each use a nationwide agreement that contains arbitration provisions similar to those at issue in the AT&T Agreement and held to be subject to state law challenge by the Ninth Circuit in this case.[4]

2. Plaintiffs' lawyers have already embraced the Ninth Circuit's decision, and further litigation resulting from that decision is inevitable. In *In re Universal Service Fund Telephone Billing Practices Litigation*, No. 02-CV-1583, *et al.* (D. Kan.) ("the USF Litigation"), for example, plaintiffs filed (prior to the Ninth Circuit's decision) more than 50 putative class actions or representative actions in state and federal courts across the country, challenging the way that AT&T, MCI, and Sprint billed customers to finance the

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[3] Although the Sprint Terms Agreement does not contain a separate provision precluding class actions, the arbitration provision itself accomplishes the same result, because arbitrations do not generally permit resolution of claims on a class-wide basis.

[4] Although both MCI and Sprint have incorporated into their nationwide agreements mandatory arbitration provisions that are similar to those employed by AT&T, other aspects of the AT&T Agreement that the Ninth Circuit found objectionable have not been incorporated into the MCI and Sprint agreements. In particular, neither MCI nor Sprint seeks in their agreements to (1) limit liability for intentional or willful misconduct, (2) require confidentiality with respect to arbitrations, or (3) require fee splitting to the same extent as AT&T. *See* Pet. App. 38a-42a (discussing those aspects of the AT&T Agreement). Moreover, significant differences between the customer contracting methods adopted by AT&T and the contracting methods and communications approaches adopted by Sprint and MCI render the companies differently situated on the merits of any "procedural unconscionability" claim. *See* Pet. App. 36a-37a (discussing procedural unconscionability claim against AT&T).

companies' obligations in connection with funds used to preserve and advance the federal universal service support mechanism. *See generally In re Federal-State Joint Board on Universal Service*, 15 F.C.C.R. 12050, ¶ 11 (2000) (describing obligations). In response to the invocation by Sprint and AT&T of the dispute resolution provisions contained in their respective customer contracts, plaintiffs have cited the Ninth Circuit's decision in this case, seeking not only to evade arbitration, but also to preserve substantive state law claims that, under the Seventh Circuit's decision in *Boomer*, the Communications Act would preempt.[5]

More broadly, Sprint and other long distance carriers are subject currently, and are certain to be subject in the future, to lawsuits challenging the provisions of their nationwide customer contracts. Thus far, the impact on MCI has been limited because virtually all commercial litigation against MCI (including the USF litigation) has been subject to the automatic stay imposed as a result of the bankruptcy filing of WorldCom, Inc. But MCI is expected to emerge from bankruptcy shortly,[6] resulting in the termination of the stay and the resumption of the suits that inevitably arise out of the provision of phone service. The widespread impact of the Ninth Circuit decision is thus undeniable.

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[5] Although MCI has been named as a defendant in a number of these consolidated actions, the automatic stay resulting from the bankruptcy filing of WorldCom, Inc. has prevented those actions from going forward against MCI. Some USF plaintiffs have filed proofs of claim against MCI in the bankruptcy case.

[6] Christopher Stern, *WorldCom to Unveil Reorganization Plan*, Wash. Post, Apr. 14, 2003, at A14 (noting WorldCom's plans to emerge from bankruptcy by Fall 2003).

3. Immediate review by this Court is needed because the Ninth Circuit's decision has upset more than a century of settled understanding regarding the source of obligations that govern domestic long distance service contracts. Even prior to imposition of the tariff-filing requirements contained in Section 203 of the Communications Act, this Court made clear in cases such as *Warren-Godwin Lumber* and *Esteve Brothers* that federal law preempts state law and is thus the sole source of substantive law regarding the rates, terms, and conditions contained in contracts for interstate telecommunications services. Numerous cases from this Court, including *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), confirmed that federal law, rather than state law, governed contracts for such services. And, in the post-tariff world, the FCC made clear in its orders that detariffing did not change the source of substantive law governing the "lawfulness of rates, terms, and conditions." 12 F.C.C.R. 15014, ¶ 76. The Seventh Circuit in *Boomer* then reaffirmed the preemptive force of federal law. Thus, while the precise contours of federal law may have been uncertain at the margins, providers of interstate telecommunications services have known for nearly a century that federal law controls the rates, terms, and conditions under which those services are provided.

The Ninth Circuit's decision has casually discarded this century of settled law. By expressly rejecting the decision of the Seventh Circuit, the Ninth Circuit has left carriers uncertain about the source of law governing the agreements that cover tens of millions of long distance customers. It is difficult enough that, in the States within the jurisdiction of the Ninth Circuit, carriers are subject to state

law where federal law has previously governed. But the current situation is worse: outside of the Seventh Circuit and Ninth Circuit, carriers do not even know whether in a particular State federal or state law controls.

Absent intervention by this Court, resolving this uncertainty will be a tremendously costly enterprise. Nationwide carriers such as *amici* will be forced to rely on Circuit-by-Circuit litigation to eliminate the confusion that the Ninth Circuit's decision has caused and to clarify the source of governing law in each federal Circuit. This Court should not leave in place a direct conflict that will necessarily impose such significant and wasteful costs on carriers and consumers, and result in the unnecessary expenditure of scarce judicial resources.

4. Finally, this Court should grant review because the Ninth Circuit's view that state law, rather than federal law, governs the lawfulness of rates, terms, and conditions of interstate long distance service is fundamentally at odds with the Communications Act and will cause serious harm to the markets for interstate telecommunications services. The Ninth Circuit's decision will inevitably result in "patchwork contracts" and a "labyrinth of rates, terms, and conditions." As the Seventh Circuit correctly concluded, reiterating the conclusion of this Court in *Warren-Godwin Lumber*, 251 U.S. at 30, such an outcome is fundamentally incompatible with the goal of "equality and uniformity," and is thus directly contrary to the terms of the Communications Act and the evident intent of Congress.

Moreover, the practical consequences of the Ninth Circuit's decision are severe. A century of exclusive federal control has resulted in an established body of federal law

governing whether a particular provision is just and reasonable. The Ninth Circuit's decision casts this substantial body of precedent aside, leaving to each individual State the task of sorting out which provisions are just and reasonable and which are not. But States have never had a role in making such determinations, and the process of building up a body of law will be a lengthy and costly process. The Ninth Circuit never explains why Congress (or the FCC) would have wanted such a process.

Indeed, it is hard to imagine such a reason. The only ground even suggested in the Ninth Circuit's opinion is the need to provide "protection for consumers." Pet. App. 29a. But that justification is utterly insufficient. Preemption of state unconscionability law does not leave consumers vulnerable. Instead, it merely relies on uniform national rules administered by the FCC rather than rules created in each of the fifty States through class action litigation. Indeed, in the detariffing order, the FCC emphasized that it would continue to enforce through its complaint process the carriers' "obligations under sections 201 and 202 to charge rates, and impose practices, classifications, and regulations that are just and reasonable, and not unjustly or unreasonably discriminatory." 12 F.C.C.R. 15014, ¶ 77.

Moreover, the FCC's principal justification for detariffing was that the long distance market itself, because it is fully competitive, would protect consumers, rendering unnecessary the extra protections that had previously been provided by tariffs. There is no reason to believe – and the Ninth Circuit provides none – that vigorous competition in the long distance market and the backstop of the Communications Act are inadequate to protect consumers, much less sufficiently inadequate to justify the substantial

costs imposed by the Ninth Circuit's decision. It is thus particularly unlikely that Congress or the Commission would have intended a result as potentially costly, unnecessary, and destabilizing as the one the Ninth Circuit has created.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., AND THE VERIZON TELEPHONE COMPANIES AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below erred in ruling that the long-standing federal displacement of state laws relating to the terms on which interstate telecommunications carriers provide service—a displacement mirrored in Congress's treatment of other national network industries—was erased when the Federal Communications Commission eliminated the requirement that carriers file tariffs as a mechanism for enforcing the governing federal statutory standards.

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This *amici curiae* brief is submitted in support of the petitioner, AT&T Corp.[1]

[1] This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel. By letters filed with the Clerk of the Court, petitioner and respondents have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Operating subsidiaries of BellSouth Corporation and Qwest Communications International Inc., and the Verizon Telephone Companies, provide voice and data telecommunications services to customers across the nation. Together they have over 72 million customers for wireline services.[2] They have invested and are continuing to invest billions of dollars in their networks to provide new services such as broadband Internet access to the home and to comply with the market-opening provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). Many of their activities are subject to regulation under the Communications Act of 1934, ch. 652, 48 Stat. 1064 ("1934 Act"), as amended most recently by the 1996 Act. BellSouth, Qwest, and Verizon will be affected by the Court's determination of the extent to which those federal statutes allow disparate state regulation of the same activities.

INTRODUCTION AND SUMMARY

1. Even before the 1934 Act, Congress subjected the telecommunications industry to federal regulation, and displaced state regulation, in recognition that the industry is national in character and demands standardized treatment. This approach paralleled Congress's handling of other national network industries. Telecommunications networks connect homes and businesses in all 50 states to each other and to the world, and the services provided over those networks are oblivious to state boundaries. In adopting the 1996 Act, Congress maintained and strengthened the federal displacement of state regulation of this increasingly national and

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[2] BellSouth, "Business Profile," *available at* http://www.bellsouth.com/investor/ir_businessprofile.html (last visited May 27, 2003); About Qwest, "Company Fact Sheet," *available at* http://www.qwest.com/about/media/presskit/companyFact/ (last visited May 27, 2003); "Redesigned Verizon Bills Arriving this Month," *Associated Press Newswire*, May 5, 2003.

global industry. Congress sought to promote greater competition in telecommunications services by preempting state barriers to entry and by shifting from *a priori* federal regulatory controls to increased reliance on the marketplace to police carriers' practices.

2. The court of appeals wrongly read the 1996 Act as an invitation to the states to regulate in areas where state laws had been preempted under pre-1996 law. The court ruled that the Federal Communications Commission ("FCC"), in exercising its authority under the 1996 Act to remove the tariff-filing requirement for long distance services, opened the way for states to dictate the terms on which those services can be provided. Applying California law, the court struck from AT&T's customer service agreement an arbitration clause and other dispute resolution provisions that are valid and permissible under federal communications statutes. The lower court's decision is wrong and conflicts directly with the decision of a sister circuit.

The lower court decision also has implications far beyond the particular services and contract provisions involved here. It reverses the long-recognized principle that telecommunications, like other national network industries, requires standardized federal rules. When the FCC eliminated the tariff-filing requirement, it did not alter—but expressly reaffirmed—that such standardized rules govern here. The agency's decision to ease federal controls by eliminating tariffs—based on a congressional policy of relying on marketplace competition to police behavior—was not an invitation for new regulatory initiatives by the states.

The Court should grant certiorari to reaffirm the primacy of federal law in regulating the national telecommunications industry.

ARGUMENT

I. By Applying State Law To Control the Terms of Service of Interstate Telecommunications Carriers, the Decision Below Departs from Established Practice in Federal Regulation of Interstate Commerce.

Congress has recognized that network industries that are interstate in character require standardized national treatment. The Interstate Commerce Act of 1887, 24 Stat. 379 ("ICA"), and later federal laws modeled on that statute, including telecommunications laws, give broad effect to that recognition by intentionally displacing state regulation. The principle of uniformity did not disappear when Congress later determined that competition rather than close regulatory controls could achieve its goals. Congress did not leave a vacuum for states to fill with disparate requirements.

A. Congress regulated telecommunications, like other interstate network industries, because the national character of the network necessitates uniform national rules.

Congress typically has extended national regulation to network industries that, having originated on a local scale, subsequently spread across state lines to become predominantly interstate in character. When national networks were taking shape in the late nineteenth century, the Court recognized that such industries would require a "species of regulation . . . [that] cannot be safely and wisely remitted to local rules and local regulations . . . . [T]he regulation can only appropriately exist by general rules and principles, which demand that it should be done by the congress of the United States under the commerce clause of the constitution." *Wabash, St. L. & P. Ry. Co. v. State of Illinois*, 118 U.S. 557, 577 (1886). The Court in *Wabash* held that the Interstate Commerce Clause barred state regulation of rates for interstate rail transport. Congress then enacted the ICA to provide standardized national regulation.

As interstate industries became more complex, Congress enacted legislation particular to the individual networks. Although tailored to the specific industries, the emerging regulatory regimes preserved the national uniformity that the Court in *Wabash* recognized was necessary and that Congress implemented in the ICA. The ICA was the model for these subsequent statutes, such as the Federal Power Act of 1920, ch. 285, 41 Stat. 1063, the Natural Gas Act of 1938, ch. 556, 52 Stat. 821, and the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.[3] As with the ICA, these federal controls were enacted in recognition that the "state is restrained by the force of the commerce clause" and "if such regulation is required it can only be attained by the exercise of the power vested in Congress."[4]

For example, under the Federal Power Act, states could not regulate the terms of interstate electric power sales.[5] In the trucking industry, although state laws "with a view to safety or to conservation of the highways" were permitted, state economic measures that had the effect of "obstruct[ing]" interstate commerce were "forbidden by the commerce clause."[6] To meet the need for uniform national rules, Congress launched regulation of that industry in 1935 "on the premise that the public interest in maintaining a stable transportation industry so required."[7] The history of airline regulation is an exception that proves the rule. Departing from the trend established in other industries, early fed-

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[3] *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 478 n.3 (2002).

[4] *Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927).

[5] *Id.*

[6] *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925) (without basis in safety to do so, state could not deny common carrier certificate of use for portion of public highway lying within state).

[7] *United States v. Drum*, 368 U.S. 370, 374 (1962).

eral airline legislation did not preempt state regulation but rather permitted the states to regulate interstate airfares.[8] But upon subsequent deregulation of the airlines, as discussed below, Congress expressly preempted such state regulation.

Congress similarly extended federal regulation to telecommunications in 1910, in recognition of the national scope of the telecommunications network. As we discuss below, the 1910 law preempted state regulation of interstate carriers' terms of service. Congress solidified federal control when it created the FCC in the 1934 Act.[9] And in the 1996 Act, Congress took even "the regulation of local telecommunications competition away from the States."[10]

B. Federal deregulatory measures in response to increased competition do not diminish the national scope of the issues or the primacy of national rules.

The principle enunciated by the Court in the late nineteenth century—that national networks necessitate national regulation—has not changed with competition and "deregulation." When the ICA was first enacted, the Court recognized that simultaneous state and federal assertion of authority would cause "a conflict . . . which would render the enforcement of the act impossible."[11] The "broad purpose of the commerce act was to compel the establishment of reasonable rates and the[ir] uniform application."[12] Congress's subsequent recognition that competition is feasible in many net-

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[8] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

[9] *See Verizon*, 535 U.S. at 478 n.3.

[10] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[11] *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907).

[12] *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155, 166 (1912).

work industries did not alter that purpose; it merely introduced reliance on competition as a preferred means of achieving it. "[T]o permit separate suits and separate findings would not only destroy the equality which the statute" and its successors "intended should be permanent, . . . but it would bring about direct conflict in the administration of the law."[13]

Thus, when Congress has eased federal regulation of national networks, it has retained the preeminence of national rules. This is true with the ICA and its progeny statutes. For example, Congress began deregulating the railroad industry in the 1970s and 1980s in order to "assure[] railroads substantially more rate freedom than [is] afforded them under [then] existing law."[14] The congressional drafters "intend[ed] that competition be recognized as the best control on the ability of railroads to raise rates" and thus expressly preempted "state authority over rail rates, classifications, rules and practices."[15] In so limiting state powers, Congress acknowledged that free reign for state regulation would have conflicted with "[t]he purpose of [the] legislation . . . to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation."[16]

Likewise, in 1980, Congress passed a law substantially deregulating interstate trucking. The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, was enacted "[a]fter

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[13] *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, 259 (1913).

[14] Staggers Rail Act of 1980, H.R. Conf. Rep. 96-1430, 1980 U.S.C.C.A.N. 4110.

[15] *Id.* at 4120; 49 U.S.C. § 11501(b)(1); *see also* H.R. Conf. Rep. No. 96-1430, 1980 U.S.C.C.A.N. 4110, 4138 (preemption necessary to "ensure that the price and service flexibility and revenue adequacy goals of the [Staggers] Act are not undermined by state regulation of rates, practices, etc.").

[16] H.R. Conf. Rep. No. 96-1430, 1980 U.S.C.C.A.N. at 1420.

years of debate over whether it was sound policy to substitute regulation for competition in the motor carrier industry."[17] Ultimately, "Congress decided to eliminate the regulatory barriers to free entry and individual ratemaking. The 1980 amendments to the [ICA] represented a fundamental policy choice in favor of deregulation."[18] In interpreting Congress's deregulatory measures in the trucking industry, the Court concluded that state regulation must be preempted where it conflicts with the federal scheme.[19]

In the same way, when Congress deregulated the airlines in 1978, it recognized that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety [and] quality . . . of air transportation services."[20] "To ensure that the States would not undo federal deregulation with regulation of their own, the [Airline Deregulation Act] included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier."[21] The Court has twice since acknowledged Congress's objective and has preserved standardized rules for the airline industry by invalidating states' attempts to impose disparate controls.[22]

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[17] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 147 (1990) (Stevens, J., dissenting).

[18] *Id.*

[19] *See, e.g., Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981) (invalidated state restriction on truck length); *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 442 (2002) (state regulation in the trucking industry is limited to "safety"; "[l]ocal regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule").

[20] *Morales*, 504 U.S. at 378 (internal quotation marks omitted).

[21] *Id.* at 378-79 (internal quotation marks omitted).

[22] *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (class action suit under state consumer fraud act challenging airline's fre-

C. In the telecommunications arena, it is established that deregulatory steps at the federal level do not reduce the primacy of national rules or permit application of 50 state rules to a nationwide industry.

The changes in federal telecommunications law in recent decades also have not lessened the preemption of disparate state rules. When the FCC deregulated telephone customer premises equipment ("CPE") in the 1970s, the agency and the courts held that the need for national rules remained and that application of state law was precluded. "If each State were to be free to establish its own rules governing interconnection [of CPE] for the purposes of intrastate services, uniform nondiscriminatory interstate service throughout the country would be rendered difficult if not impossible."[23]

Similarly, federal determinations have preemptive effect in the new regime created by the 1996 Act. In that statute, Congress directed the FCC to determine which elements of an incumbent local exchange carrier's network must be unbundled and provided to competitors at regulated prices.[24] When the FCC adds—or subtracts—an element from the list of unbundled elements, the states are precluded from adopting 50 different rules that deviate from the national determination. As this Court ruled in *Iowa Utilities Board*, "the

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quent flyer program preempted by Airline Deregulation Act; but state law breach of contract claims allowed); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (Airline Deregulation Act preempts states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes).

[23] Memorandum Opinion and Order, *Telerent Leasing Corp., et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-Furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C.2d 204, 219-20 ¶ 37 (1974), *aff'd, North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976).

[24] 47 U.S.C. § 251(d)(2).

Federal Government has taken the regulation of local telecommunications competition away from the States," and the FCC may therefore "draw the lines to which [the states] must hew," lest the industry fall into the "surpassing strange" incoherence of "a federal program administered by 50 independent state agencies" without adequate federal oversight.[25]

Likewise, when Congress moved to partially deregulate mobile wireless services, it expressly forbade the states from regulating rates or entry by mobile service providers.[26] Congress permitted state regulation of "other terms and conditions" of mobile services, but only to the extent that such regulation does not amount to regulation of rates.[27] States may petition the FCC for authority to regulate mobile wireless rates, but the FCC has uniformly denied such requests.[28]

Finally, nothing in the FCC's Detariffing Orders involved here eliminated the primacy of federal law with respect to the terms of service.[29] To the contrary, as discussed

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[25] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

[26] 47 U.S.C. § 332.

[27] *See Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 988 (7th Cir. 2000) (state-law complaint that service provider offered service before its network was adequately built out was a forbidden attempt to regulate rates on grounds that "a complaint that service quality is poor is really an attack on the rates charged for the service").

[28] *E.g.*, Report and Order, *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 FCC Rcd 7842 (1995); Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 FCC Rcd 7025 (1995), *aff'd*, *Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

[29] Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, 20732-33 ¶ 3 (1996) ("Detariffing Second Report and Order"); Order on Reconsideration, *Policy and Rules Concerning the Interstate, Interexchange Market-*

below, the FCC confirmed that federal law would continue to govern, and the courts have agreed—except for the court of appeals in the decision below.[30]

II. The Decision Below Destroys the Uniform Application of Federal Law in the Telecommunications Arena, Which has Prevailed for Over 90 Years.

By sanctioning the application of California law to determine the lawfulness of the terms on which AT&T provides long-distance services, the court of appeals disregarded 90 years of settled law that federal law exclusively governs the terms of those services. Court decisions that predated the tariff-filing requirement of the 1934 Act established that, whether or not a service is tariffed, the lawfulness of its terms is to be judged against a uniform federal "just and reasonable" standard, *not* the varying standards that might be found in the laws of the 50 states. Nothing in the FCC's post-1996 Act orders lifting the tariff-filing requirement diminished the primacy of federal law as to the terms of those services. In holding to the contrary, the court of appeals fundamentally

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place, 12 FCC Rcd 15014, 15056-57 ¶ 76 (1997) ("Detariffing Reconsideration Order") (together "Detariffing Orders").

[30] *See, e.g., Boomer v. AT&T Corp.*, 309 F.3d 404, 420, 422 (7th Cir. 2002) ("[D]etariffing does not alter the fundamental design of the Communications Act, nor modify Congress's objective of uniformity in terms and conditions for all localities. . . . [A]llowing state law to determine the validity of the various terms and conditions agreed upon by long-distance providers and their customers [would] create a labyrinth of rates, terms and conditions and this violates Congress's intent in passing the Communications Act."); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 247 F. Supp. 2d 1215, 1229-30 (D. Kan. 2002) (even after the FCC's mandatory detariffing of interstate services, state-law conversion claims challenging interstate carriers' universal service charges "will necessarily become enmeshed in questions of the justness or reasonableness" of rates and must therefore be governed exclusively by sections 201 and 202).

misconceived the relationship between federal and state law in the important telecommunications sector.

A. The primacy of federal law on the terms of service predates the requirement to file tariffs.

In the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539, Congress for the first time asserted federal control over the terms of service by telephone and telegraph carriers. The 1910 statute extended to those carriers the prohibitions of the ICA against any "unjust or unreasonable or unjustly discriminatory . . . classification, regulation, or practice." The statute further authorized the Interstate Commerce Commission ("ICC") to enforce those standards against the carriers in complaint proceedings.[31] These national standards were not embodied in a tariff provision: The Mann-Elkins Act did not require carriers to file tariffs with the ICC, nor did it even allow them to do so without "permission."[32]

This federal enactment was recognized from the outset to preempt state law. In *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, the Court held that federal law, not state law, governed the validity of a contractual provision limiting a carrier's liability for negligence in forwarding messages. The Court noted that the ICA, as amended by the Mann-Elkins Act, "was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefor[e] was an *occupation of the field* by Congress which *excluded state action*."[33] In *Western Union Telegraph Co. v. Boegli*, the Court forbade

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[31] Mann-Elkins Act, §§ 7, 11, 36 Stat. 539, 545, 551 (1910).

[32] *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921); *see also Essential Communications Sys., Inc. v. AT&T Co.*, 610 F.2d 1114, 1118 (3d Cir. 1979) (noting that Mann-Elkins Act did not subject interstate telecommunications carriers to mandatory filed-rate provisions of the ICA that had previously been imposed on railroads).

[33] 251 U.S. 27, 30-31 (1919) (emphasis added).

the imposition of liability under state law for failure promptly to deliver an interstate telegram—an issue not covered by the carrier's voluntarily filed tariff—because the ICA "so clearly establish[es] the purpose of Congress to subject [telegraph] companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate."[34] The Court has expressly held that tariff filings, where permitted, are merely "procedural features" of the ICA, and that the preemptive effect of the statute "flows from the requirement of equality and uniformity of rates laid down in Section 3 of the [ICA]."[35]

These cases reflect the recognition, discussed in Part I, *supra*, that the interstate nature of the telecommunications network necessitates the application of national regulatory standards. As one court noted following the enactment of the Mann-Elkins Act, "[t]he great necessity that commerce between the states should be free from . . . interference [by state laws] applies in a marked degree to interstate commerce by telegraph."[36] This was because, if interstate telecommunications carriers' terms of service "should be held valid in Kansas, and void in Oklahoma, and the illustration may be extended to all the states of the Union, then the power of the United States to regulate commerce between the states in relation to telegraphic business would not only be directly interfered with, but destroyed."[37]

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[34] 251 U.S. 315, 316 (1920).

[35] *Esteve Bros.*, 256 U.S. at 573. As discussed in the text below, section 3 of the ICA is the predecessor of sections 201(b) and 202(a) of the 1934 Act.

[36] *Gardner v. Western Union Tel. Co.*, 231 F. 405, 412 (8th Cir. 1916).

[37] *Id.*

When Congress adopted the 1934 Act, it preserved and reaffirmed this federal occupation of the field. The 1934 Act created the FCC to regulate telecommunications, and required for the first time that telecommunications carriers file federal tariffs for their interstate services.[38] Congress left intact the substantive standards that had applied to interstate telecommunications carriers under the ICA: requirements that those carriers have "just and reasonable" "charges, practices, classifications, and regulations" (section 201(b)) and that they refrain from engaging in "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" (section 202(a)).[39] These provisions were copied from the ICA almost verbatim in order to "preserve the value of court and commission interpretations of that act" as to telecommunications carriers.[40]

Until the decision below, the courts of appeals had recognized that the 1934 Act continued the preemption of state-law with respect to the terms of interstate carriers' services. Under the 1934 Act, it remained the case that "questions concerning the duties, charges and liabilities of telegraph or telephone companies . . . are to be governed solely by federal law and . . . the states are precluded from acting in this area."[41] In fact, where "neither the Communications Act it-

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[38] *See* 47 U.S.C. §§ 151, 203.

[39] *Id.* §§ 201(b), 202(a).

[40] H.R. Rep. No. 73-1850, at 4 (1934).

[41] *Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 491 (2d Cir. 1968); *see also Long Distance Telecomms. Litig. v. ITT-U.S. Transmission Sys., Inc.*, 831 F.2d 627, 634 (6th Cir. 1987) (where suit under state law confronts "implied congressional purpose to require uniformity and equality of service . . . by communications companies, . . . state law [cannot] apply"); *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 864 (2d Cir. 1986) ("[T]he need for uniformity is the reason . . . that federal common law preempts state law and supplies the rule of decision for tort and contract claims relating to the duties, charges, and liabilities of telephone carriers concerning interstate telecommunications.").

self nor the tariffs filed pursuant to the Act deal with a particular question," the dispute should be governed by "a uniform rule of federal common law."[42] The 1934 Act authorized the states, with some exceptions, to regulate purely intrastate telecommunications services.[43] As noted in Part I above, Congress in 1996 largely rescinded that carve-out by preempting state barriers to entry and by prescribing federal market-opening requirements that take "the regulation of local telecommunications competition away from the States."[44]

The addition in 1934 of a tariff-filing requirement—bringing with it the filed-tariff doctrine, which forbade provision on terms other than those in the tariff[45]—was, of course, entirely consistent with the preservation of uniform federal standards. In the absence of substantial competition, the tariff-filing requirement gave the FCC an enforcement device to ensure that carriers' rates and terms of service would adhere to the substantive standards in the Act.[46]

But the tariff-filing requirement was just as clearly not the source of those substantive standards, or of the federal

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[42] *Ivy Broad. Co.*, 391 F.2d at 491; *see also McDermott v. Western Union Tel. Co.* 746 F. Supp. 1016, 1020 (E.D. Cal. 1990) (Even though Congress has declined to require providers of interstate money transfer services to file tariffs, federal common law must apply to plaintiff's complaint for misrepresentation and intentional infliction of emotional distress because there is no evidence that Congress "limited the broad scheme that it set in place for regulating communications carriers.").

[43] Communications Act of 1934, § 2(b), 47 U.S.C. § 152(b) (amended 1996).

[44] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6; *see* 47 U.S.C. §§ 251-253, 271.

[45] *Maislin Indus.*, 497 U.S. at 129.

[46] *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000) (1934 Act's tariff provision "require[d] the FCC to review telecommunications carriers' tariffs *to ensure their reasonableness*") (emphasis added).

occupation of the field. Rather, it "merely served as a mechanism by which the FCC could assure compliance with the standards set forth in Sections 201 and 202."[47]

Indeed, the complete independence of the federal standards of sections 201(b) and 202(a) from the tariff-filing requirement is illustrated by the FCC's pre-1996 Act decisions detariffing long distance services. When the FCC tried to order detariffing prior to the 1996 Act, it emphasized that it was not doing away with the requirements of sections 201 and 202. The agency declared: "We have not eliminated the requirements that rates be just, reasonable and non-discriminatory. We have merely changed the method by which we will police that requirement."[48] It explained that "we have determined that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates. We have other means to ensure our enforcement of mandates of the Act. In particular, we shall continue to investigate and adjudicate complaints under Section 208."[49] The Court's subsequent finding that the FCC lacked detariffing authority under the 1934 Act[50] led Congress to grant that authority in the 1996 Act, setting the stage for the Detariffing Orders involved here.

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[47] *Boomer*, 309 F.3d at 421; *see also AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998) (rejecting application of state-law remedy permitted under tariff because doing so could create an unlawful "preference[]" under 47 U.S.C. § 202(a)).

[48] First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, 4 ¶ 6 (1980).

[49] Sixth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 99 F.C.C.2d 1020, 1028-30 ¶ 12 (1985), *vacated and remanded on other grounds, MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[50] *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994).

B. The FCC's post-1996 Act Detariffing Orders expressly did not change the exclusive application of federal law to the terms of service.

The court below misconceived the nature of the regulatory change brought about by the 1996 Act. That court ruled that the 1996 Act's "chosen means" of enforcing the "just and reasonable" standard of sections 201(b) and 202(a) was federal "deregulat[ion]," allowing state law to enter in where it previously was displaced.[51] To the contrary, where Congress has occupied the field, a relaxation of federal controls does not turn the field over to the states. The Detariffing Orders expressly confirm the FCC's intent in exercising its forbearance power to maintain the primacy of federal law governing carriers' terms of service. The orders also confirm the FCC's intent to permit state law to come into play only as to the formation or breach of the contractual "legal relationship between the carrier and customer."[52]

In section 10 of the 1996 Act, Congress authorized the FCC to forbear from enforcing any provision of the 1934 Act, as amended, or any regulation adopted thereunder. That authority is conditioned on the FCC's finding, *inter alia*, that enforcement of the provision in question is not necessary to ensure that the relevant terms of service "are just and reasonable and are not unjustly or unreasonably discriminatory."[53] Congress went on to declare that, after the FCC decides to forbear from enforcing a provision of the Act or one of its rules, no state may contradict the FCC's determination by enforcing that statutory or regulatory provision.[54] Congress thus anticipated that the states might attempt to step in to

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[51] *See* App. 22a-32a.

[52] *Detariffing Reconsideration Order*, at 15057 ¶ 77.

[53] 47 U.S.C. § 160(a).

[54] *Id.* § 160(e).

regulate where the FCC has forborne, and it expressly forbade that.

Soon after the passage of the 1996 Act, the FCC found that detariffing of long-distance services met the forbearance criteria, based on the presence of competition in the marketplace, and consequently ordered the carriers to cancel their FCC tariffs.[55] In so doing, the FCC expressly preserved the exclusive application of federal law (including the substantive standards in sections 201(b) and 202(a)) to the terms of service. The agency emphasized that, after lifting the tariff-filing requirement of section 203, it would "continue to examine legal, and, where appropriate, policy matters *to give full effect* to the requirements that a carrier's rates, terms, and conditions are just, reasonable, and not unreasonably discriminatory, as well as the requirements of [FCC] rules and orders."[56] In rejecting claims that consumers would be inadequately protected under this regime, the FCC noted that its "administration of the Section 208 complaint process" for enforcement of federal standards, combined with "market forces" and its ability to reimpose tariffs in the future, if necessary, would be sufficient to protect consumers.[57]

AT&T sought clarification of the order on precisely the point at issue here: "that federal, and not state, law governs the determination" whether a carrier's rates and terms of ser-

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[55] *See Detariffing Second Report and Order*, at 20732-33 ¶ 3.

[56] *Id.* at 20746 ¶ 26 (emphasis added).

[57] *Id.* at 20750 ¶ 36. In resting its detariffing decision in part on the continued applicability of sections 201, 202, and 208 to the detariffed services, the FCC did not suggest that it lacks authority to forbear from applying those sections in an appropriate case. Section 10 authorizes forbearance from the application of "any provision" of the amended 1934 Act, with qualifications not here relevant. 47 U.S.C. § 160(a), (d). Any such forbearance decision would leave state law preempted, unless the agency or Congress expressly authorizes the application of state law.

vice are just and reasonable.[58] AT&T asked the FCC to make clear that the door was closed to "challenges under state law to the lawfulness of rates, terms, and conditions for . . . interstate services."[59] In response, the agency expressly "agree[d]" with AT&T that "the Communications Act *continues to govern* determinations as to whether rates, terms and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory."[60] State law, the agency said, may be applied only to "*other issues*, such as contract formation and breach of contract, that arise in a detariffed environment." In the absence of tariffs, the source of the legal relationship between the carriers and the customer is contract, and "state consumer protection and contract laws" can be applied to "issues regarding the legal relationship between the carrier and customer."[61]

In short, the FCC's regime permits state law to be applied to issues "such as contract formation and breach of contract."[62] But it does not permit a customer to *challenge under state law* the terms of service, because the lawfulness of those terms is governed exclusively by federal law.[63]

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[58] *See Detariffing Reconsideration Order*, at 15056-57 ¶ 76.

[59] *Id.*

[60] *Id.* at 15057 ¶ 77 (emphasis added).

[61] *Id.* (emphasis added).

[62] *Id.*

[63] *See Boomer*, 309 F.3d at 421 (to permit challenges to terms of CSAs under state unconscionability standards "would open the door for direct conflicts between federal and state law on the validity of terms and conditions contained in a long-distance service contract"); *Universal Serv. Billing Practices*, 247 F. Supp. 2d at 1229-30 (refusing to entertain state law claims that "will necessarily become enmeshed in questions of the justness or reasonableness" of rates and must therefore be governed exclusively by sections 201 and 202).

Consumers have federal remedies for any violations of the governing federal standards. They may file a complaint at the FCC under section 208 or go to federal district court under section 207. But the challenges must be brought as a matter of federal law, under the standards of sections 201(b) and 202(a). The FCC has found that the availability of these fora affords customers adequate protection against unlawful practices by interstate carriers. In the Detariffing Orders, the agency found, as it had in its pre-1996 Act detariffing proceedings, that its complaint process, combined with market forces, would fully ensure that interstate carriers' terms and conditions would remain "just and reasonable" and not "unjustly . . . discriminatory."[64]

In sum, the Detariffing Orders expressly did not disturb the primacy of federal law that has prevailed in this area for nearly a century. "[E]ven though the FCC no longer mandates the filing of tariffs, the congressional objective of providing uniform rates, terms and conditions remains, as does the federal prohibition on terms and conditions which are unjust or unreasonable."[65] The Ninth Circuit's decision improperly disrupts this federal uniformity by opening the door to disparate state-law standards, and thereby threatens the efficient regulation of the national telecommunications industry.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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[64] *Detariffing Second Report and Order*, at 20742-43 ¶ 21.

[65] *Boomer*, 309 F.3d at 421-22.

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